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Two Ways to End a Marriage: Divorce or Death

Laura A. Rosenbury*

Default rules governing property distribution at divorce and death are often identified as one of the primary benefits of marriage. This Article examines these default rules in all fifty states, exposing the ways property distribution differs depending on whether the marriage ends by divorce or death. The result is often counterintuitive: in most states, a spouse is likely to receive more property if her marriage ends by divorce than if the marriage lasts until "death do us part." This difference can be explained in part by the choices of feminist activists over the past thirty-five years: feminists played a large role in the reform of divorce law but have largely ignored inheritance law. This Article begins to fill the void by exploring what current inheritance laws reflect about the states' conceptions of marriage and the roles of spouses within marriage. In doing so, the Article questions whether inheritance law should be reformed to conform with divorce law or whether women would benefit more from a reexamination of the partnership theory of marriage that informs current divorce law.

The benefits of civil marriage, frequently taken for granted in the past, are now the subject of explicit and often intense debates. Most prominently, proponents of same-sex marriage have highlighted the dignity and social acceptance that flow from the states' recognition of sexual relationships.¹ But

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¹E.g., WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 7–13 (1996); David B. Cruz, "Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource, 74 S. CAL. L. REV. 925, 928–30, 933–45 (2001); Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 L. & SEXUALITY 63, 83–90 (1991); Jonathan Rauch, *Imperfect Unions*, N.Y. TIMES, Aug. 15, 2004, § 4, at 11. The campaign for same-sex marriage is not the first time that individuals have emphasized the dignity and social acceptance that accompanies marriage. After the Civil War, freed slaves sought state recognition

access to the institution of marriage is just the beginning. Once married, spouses receive tax, social security, and family-related benefits that are unavailable to nonmarried individuals.² Spouses also have exclusive access to state rules governing the termination of their relationship through divorce, including default property distribution rules.³ If the relationship ends through death, surviving spouses may exercise inheritance rights through elective share laws and intestacy schemes, which most states grant to spouses only.⁴

of their marriages as part of their quest for full citizenship status. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 270 (1999). At the beginning of the twentieth century, immigrants from Asian countries similarly fought for the right to marry. NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 132–55, 183–85 (2000).

²See Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 146–52 (2003) (enumerating benefits of marriage); Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 357–62 (2004) (discussing and critiquing benefits of marriage). The federal government even believes that marriage will make poor women wealthier or, at least, less dependent on the state. Hamilton, *supra*, at 309–10, 366–68; COTT, *supra* note 1, at 221–23; Susan Lerner, *The Bush Administration's Misguided Poverty Cure: Marriage on the Mind*, NATION, July 5, 2004, at 40, 40. However, for some married couples, the benefits of marriage are partially offset by a federal income tax penalty. See, e.g., Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative Issues in Black and White*, 16 N.Y.L. SCH. J. HUM. RTS. 287, 288–90 (1999) (describing marriage bonus in one-income households and marriage penalty when spouses earn similar incomes).

³See *infra* Part I (discussing state rules governing property distribution upon divorce). These rules operate as defaults only if a couple is married, except in five states—California, Hawaii, Oregon, Vermont, and Washington—where the default rules may be available to some cohabitating couples or couples in domestic partnerships or civil unions. See CAL. FAM. CODE § 297.5 (West 2004) (extending default rules to registered domestic partners); HAW. REV. STAT. § 572C (2005) (extending default rules to registered reciprocal beneficiaries); VT. STAT. ANN. tit. 15, § 1204 (2002) (extending default rules to couples in registered civil unions); Wilbur v. DeLapp, 850 P.2d 1151, 1153 (Or. Ct. App. 1993) (extending default rules to cohabitating opposite-sex couples); Connell v. Francisco, 898 P.2d 831, 834–36 (Wash. 1995) (extending default rules to cohabitating opposite-sex couples). New Jersey recently passed a domestic partnership law, but that law does not extend default property distribution rules to domestic partners upon the dissolution of their partnership. See N.J. STAT. ANN. § 26:8A-10 (West 2005). The American Law Institute has proposed that its model family dissolution default rules be extended to all couples cohabitating for a specified period (barring agreements to the contrary), but no additional states have adopted that approach. See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.02–.06, at 907–43 (2002) [hereinafter PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION]. Of course couples not in marriages or other relationships recognized by a state can enter into contracts that incorporate principles similar to the default rules, but the rules are not available to them in the absence of such contracts.

⁴See *infra* Parts II & III (providing state-by-state analysis of property distribution upon death). As set forth *infra* text accompanying notes 64–65, most states grant inheritance rights only to those individuals who occupy the legal status of spouse. The only exceptions are California, Hawaii, Maine, New Hampshire, and Vermont. See CAL. FAM. CODE § 297.5 (extending inheritance rights to registered domestic partners); HAW. REV. STAT. § 572C (extending inheritance rights to registered reciprocal beneficiaries); ME. REV. STAT. ANN. tit. 18-A, § 1-201(10-A) (1998) (extending inheritance rights to registered domestic partners); N.H. REV. STAT. ANN. § 457:39 (1992) (extending inheritance rights to “[p]ersons cohabitating and

Given these government benefits, the common perception of marriage as among the most private of institutions⁵ is flawed at best. By conferring access to marriage, the fifty states have long performed a public gatekeeping function that determines who will receive the dignity and social acceptance of being married, as well as the other benefits that the states and federal government attach to marriage.⁶ By providing the means to terminate marriage, the fifty states have also long regulated marital dissolution, requiring judicial approval of divorces and the ensuing division of marital property, even if the terms of the divorce settlement are reached privately.⁷ Although such state involvement at the beginning and end of marriage does not directly regulate the activity of individuals within marriage, the states' gatekeeping and dissolution functions do serve to legitimize certain relationships over others,⁸ and to define the

acknowledging each other as husband and wife, and generally reputed to be such, for the period of three years"); VT. STAT. ANN. tit. 15, § 1204 (extending inheritance rights to couples in registered civil unions). Once again, New Jersey's new domestic partner law does not grant inheritance rights to domestic partners. N.J. STAT. ANN. § 26:8A-10. Individuals who function as spouses, but do not occupy the legal status of spouse, may not exercise spousal inheritance rights in the other forty-five states. *See, e.g., In re Estate of Cooper*, 592 N.Y.S.2d 797, 798, 801 (N.Y. App. Div. 1993) (explaining that purported same-sex marriages do not give rise to any inheritance rights).

⁵*See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.").

⁶COTT, *supra* note 1, at 4–8. Under the federalist system of the United States, the states, as opposed to the federal government, set the requirements for entering civil marriage. *See* U.S. CONST. amend. X; Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821 (1995). The federal government then confers tax, social security, and other benefits to individuals who are in valid marriages as defined by any of the fifty states. The only exception can be found in the context of same-sex marriages, currently recognized as valid in the Commonwealth of Massachusetts. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003). The federal government refuses to confer benefits on these marriages pursuant to the Defense of Marriage Act. 28 U.S.C. § 1738C (2000); 1 U.S.C. § 7 (2000).

⁷*See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW* 498–504 (1st ed. 1973) (discussing early development of divorce law in United States); Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 799–801 (discussing circumstances under which divorce has been permitted by states); Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1162–63 (discussing how "legal developments during the nineteenth and twentieth centuries facilitating marital dissolutions heightened public involvement in the family").

⁸*See* Bernstein, *supra* note 2, at 177 (discussing how state-sponsored marriage "stigmatizes cohabitation as less privileged" and "establishes the gender-dimorphous dyad as the preferred way to arrange one's private life"); Hamilton, *supra* note 2, at 331–35 (discussing how couples who marry "implicitly communicate approval (or, at best, lack of principled disapproval) of the institutionalized heterosexual privileging that is marriage"); Michael Warner, *Beyond Gay Marriage*, in LEFT LEGALISM / LEFT CRITIQUE 259, 260 (Wendy Brown & Janet Halley eds., 2002) ("Marriage sanctifies some couples at the expense of others. It is selective legitimacy."). For a defense of the privileged status of marriage and an argument that the privilege should be

practical alternatives to getting and staying married.⁹ As such, states play a role in shaping the meaning of marriage for individuals.¹⁰

Of course states are not the only actors that shape the meaning of marriage, but state conceptions of marriage can often trump other conceptions, particularly when state action is needed to begin or end marriage. This Article specifically considers the conceptions of marriage reflected in state default rules governing the distribution of property at the end of marriage and how such conceptions interact with the attitudes and behavior of individuals within marriage. Some of these default rules have been criticized in the past for not conforming to the realities of married life. An examination of the current default rules thus provides an opportunity to consider both how the default rules have been reformed, and not reformed, in response to changing social norms and how the default rules shape such norms themselves.

Part I examines the current default rules governing the distribution of marital property upon divorce in all fifty states. Although variations exist among the states, every state's default approach is now designed to effectuate an equal¹¹ or equitable¹² division of all property accumulated from wages during marriage, regardless of the title of that property. In practice, equal or even equitable distributions do not always occur, but it is commonly acknowledged that these default rules correctly reflect a conception of marriage as a partnership of two equals.¹³

But there are two ways to end a marriage: divorce or death. If states conceive of marriage as a partnership, then presumably all property

extended to same-sex couples who choose to marry, see Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 229–30, 236–55.

⁹See Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 76, 94–98 (2004) (discussing how divorce law affects ongoing marriages).

¹⁰In addition, these rules governing marriage shape what it means to be in a romantic relationship outside of marriage. See Davis, *supra* note 1, at 288 (“The law decides what relationships to recognize and not to recognize, and which to clothe with legal significance. . . . People live their lives in the social landscape thus constructed; in this sense we are all loving in the shadow of the law.”).

¹¹Equal divisions generally occur in the community property states. See *infra* notes 19–25 and accompanying text (listing community property states and discussing equal division of property).

¹²Equitable distributions occur in the separate property states. For a discussion of the different equitable distribution approaches, see *infra* text accompanying notes 30–39.

¹³See, e.g., Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L.J. 141, 142–43 (2004) (“Sharing a life together profoundly influences the ways in which couples structure and shape their lives. . . . [M]odern family law recognizes this sharing process through its embrace of partnership marriage as the dominant theory of marriage and divorce.”); Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413, 1413–16 (1996) (describing how partnership theory of marriage has been accepted in family and tax law). For other discussions endorsing the partnership theory or similar conceptions of marriage in the context of divorce, see sources cited *infra* note 41.

accumulated from wages during marriage would be divided equally or equitably regardless of the method of marital dissolution. Parts II and III of this Article provide the first state-by-state analysis of the differences between property distribution upon death and divorce in order to test this hypothesis. The analysis shows that the states treat property division in fundamentally different ways depending on whether the marriage ended by divorce or death. In the majority of states, all property accumulated from wages during marriage is divided roughly equally upon divorce, but is not divided equally upon the death of a spouse. Rather, as set forth in Part II, although surviving spouses are given the right to make claims against the wills of their deceased spouses, most states limit these claims to considerably less than half of the deceased spouse's estate. In addition, as set forth in Part III, even when a spouse dies without a will, the surviving spouse in some states can receive less than half of the deceased spouse's estate. The result is counterintuitive: in many instances, the surviving spouse would have been better off financially had she divorced her spouse rather than staying in the marriage "till death do us part."

The partnership theory of marriage has thus prevailed only in the context of default rules governing divorce. Other scholars have identified this general problem and called for various reforms of inheritance law in accordance with the partnership theory of marriage.¹⁴ This Article takes a different approach.

¹⁴See Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 598–604 (1995) (proposing that surviving spouse be given right to elect one-half share of acquests of marriage); Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487, 524–36 (2000) (proposing "value deferred-community-property elective-share system"); J. Thomas Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*, 38 CASE W. RES. L. REV. 223, 245–47 (1987) (arguing that elective share system "should be modified to reflect the concept of marital partnership"); B. Redman, *Entitlement of a Surviving Spouse: A Quandary*, 27 CAP. U. L. REV. 573, 601–05 (1999) (discussing benefits of extending community property rules to all marriages that end in death); Rena C. Sepowitz, *Transfers Prior to Marriage and the Uniform Probate Code's Redesigned Elective Share—Why the Partnership Is Not Yet Complete*, 25 IND. L. REV. 1, 67–70 (1991) (proposing changes to elective share laws designed to promote "the goal of marriage as a total partnership"); Helene S. Shapo, "A Tale of Two Systems": *Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707, 727–32 (1993) (discussing and critiquing extension of partnership theory of marriage in context of model elective share laws); Margaret Valentine Turano, *UPC Section 2-201: Equal Treatment of Spouses?*, 55 ALB. L. REV. 983, 998–1006 (1992) (discussing extension of partnership theory of marriage to marriages that end in death); Angela M. Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. U. L. REV. 519, 562–70 (2003) (proposing equitable elective share statute); Ronald R. Volkmer, *Spousal Property Rights at Death: Re-Evaluation of the Common Law Premises in Light of the Proposed Uniform Marital Property Act*, 17 CREIGHTON L. REV. 95, 104–10 (1983) (discussing scholarship arguing that "the revolution that was occurring in divorce law could not logically be confined to termination of marriage by divorce"); Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. MICH. J. L. REFORM 1, 30–32 (2003) (proposing changes to Uniform Probate Code to more closely reflect partnership theory of marriage). Interestingly, however, many family law scholars discuss the partnership theory of

First, Parts II and III examine what the differences in marital property division at divorce and death reveal about the states' conceptions of marriage and the roles of spouses within marriage. The different default rules for property division at divorce and death reflect not only divergent approaches to property ownership within marriages, but also the different entitlements of divorcees and surviving spouses. These different entitlements affect the lives of women more than those of men because wives tend to outlive their husbands, making most surviving spouses women.¹⁵ In most states, spouses are often entitled to more property if they are divorcees, a category comprised equally of men and women,¹⁶ than if they are surviving spouses, a category comprised predominantly of women.

Part IV then explores how these different entitlements may reflect ambivalence about the partnership theory of marriage. The default inheritance rules provide deceased spouses, usually men, power to distribute more marital property at death than would be permitted upon divorce. This could be seen as an implicit reward for staying in a marriage until death. However, this reward carries a corresponding penalty for the surviving spouse, namely that she will likely have less property to give away at her own death than her husband was able to give away at his death. Instead of embracing a concept of marriage as a partnership of two equals, the default inheritance rules expect a surviving spouse to sacrifice for the relationship.

marriage without ever acknowledging that the theory has not been fully extended to marriages that end in death. *See, e.g.,* Frantz & Dagan, *supra* note 9, *passim* (failing to consider whether marriages that end in death should also be governed by "the ideal of marriage as an egalitarian liberal community"); Kelly, *supra* note 13, *passim* (praising partnership theory of marriage, but failing to acknowledge that theory has not been fully extended to marriages that end in death).

¹⁵In 2002 the average life expectancy for women of all races was 79.9 years, whereas the average life expectancy for men of all races was 74.5 years. U.S. CTR. FOR DISEASE CONTROL, EXPECTED LIFE EXPECTANCY AT BIRTH IN YEARS, BY RACE AND SEX: DEATH-REGISTRATION STATES, 1900–28, AND UNITED STATES, 1929–2002, NAT'L VITAL STAT. REP. 33 tbl. 12 (2004), available at http://www.cdc.gov/nchs/data/dvs/nvsr53_06t12.pdf. Such life expectancy statistics indicate that a surviving spouse is more likely to be a woman, given that every state but Massachusetts refuses to recognize same-sex marriages and women tend to enter marriage at a younger age than men do. *See* Waggoner, *supra* note 14, at 12–18 (discussing statistics about average age of women and men at time of marriage). In addition, women have been more than four times as likely to be widowed than men since 1990, according to the U.S. Census Bureau's 1990 and 2000 Decennial Census Data Sets and the 2000 to 2004 American Community Surveys. *See* U.S. CENSUS BUREAU, DATA SETS, available at http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=DEC&_lang=en (showing that in 1990 there were 12,121,939 widows and 2,377,589 widowers; in 2000 there were 11,975,325 widows and 2,699,175 widowers; in 2003 there were estimated to be 11,182,170 widows and 2,642,475 widowers).

¹⁶Divorcees have necessarily been comprised equally of men and women because of the total prohibition against same-sex marriage. Of course this gender composition could change in Massachusetts given its recent recognition of same-sex marriage. *See supra* note 6 (discussing Massachusetts' recognition of same-sex marriage). However, the gender composition would change only if same-sex male couples divorce at greater rates than same-sex female couples, or vice versa.

Part IV continues by examining how the partnership theory of marriage, while seemingly more egalitarian, may also reinforce wifely sacrifice by rewarding women for caring for their husbands and children at the possible expense of their own tangible property acquisition or other forms of individual fulfillment. The partnership theory thereby reinforces traditional gender role expectations allocating wage work to men and care work to women.¹⁷ The partnership theory is premised on equal sharing of material resources within a marriage, but it does nothing to encourage equal sharing of the care work that is needed to sustain a marriage, nor does it encourage equal sharing of the wage work. In fact, the partnership theory contributes to the perception that the allocation of wage work to men and care work to women is a natural division of labor as opposed to a societal construct.

This Article's examination of the state default rules governing the division of property at the end of marriage thus provides an opportunity to reexamine the commonly held belief that the partnership theory of marriage should inform all such rules. Part V concludes with a call for more discussion about alternative theories of marriage that could underlay default rules governing property division at divorce and death.

I. WHEN SPOUSES DIVORCE

Upon divorce, the property accumulated by a married couple is currently divided according to one of two approaches adopted by the states. The first approach, known as the community property approach, has long been employed by a minority of states referred to as "community property" states. The second approach, known as the equitable distribution approach, was adopted by the remaining states, referred to as "separate property" states, beginning in the 1970s. These default approaches apply in the absence of valid prenuptial agreements that alter the default rules.¹⁸

¹⁷For definitions and discussions of care work, see Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 375 (2001) (defining cultural caregiving as "the nurturing work performed by women that is understood by the law and society more broadly to be a function of gender socialization or an ethic of care"); Martha T. McCluskey, *Caring for Workers*, 55 ME. L. REV. 314, 317–20 (2002) (describing care work as including housework, dependent care, budgeting and other financial planning, emotional and other work needed to maintain social connections, and unpaid participation in wage earner's paid work); and Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 92–93 (1998) (describing families as being "supported by both money and a constant flow of unpaid labor in the form of housekeeping, child, elder and other dependent care, household management, counseling and other emotional support, and entertainment").

¹⁸For a discussion of how states are increasingly upholding the terms of these agreements, see *Developments in the Law—Marriage as Contract and Marriage as Partnership: The Future of Antenuptial Agreement Law*, 116 HARV. L. REV. 2075, 2078–87, 2095–98 (2003) [hereinafter *Developments in the Law*].

A. *Community Property: Partnership at All Times*

In the nine states known as community property states,¹⁹ all property accumulated by either spouse from earnings during the marriage is considered to be the joint or community property of the spouses. Each spouse therefore owns an equal, undivided share in all acquisitions from earnings during marriage, regardless of which spouse holds the title of those acquisitions. This means that a spouse “cannot freely give away community property” during marriage without the permission of the other spouse.²⁰ Similarly, title does not control the distribution of community property upon divorce. Rather, divorce courts in these states generally apply a rule or presumption of equal division of the community property upon divorce.²¹ As such, in most instances, each spouse is given one-half of the value of the community property,²² while each spouse is permitted to keep any property that he or she brought to the marriage or that he or she received during the marriage from sources other than earnings.²³

This approach to the division of marital property is now generally viewed as “explicitly recognizing marriage as a partnership”²⁴ because it is based on

¹⁹These states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. See TEX. CONST. art. 16, § 15; ARIZ. REV. STAT. ANN. §§ 25-211 to -217 (2000); CAL. FAM. CODE §§ 760, 780, 1100, 1620, 2550 (West 2004); IDAHO CODE ANN. §§ 32-903 to -12 (1996 & Supp. 2004); LA. CIV. CODE ANN. art. 2325–27, 2334–43 (1985 & Supp. 2005); NEV. REV. STAT. §§ 123.010–.080, 123.220–.259 (2003); N.M. STAT. §§ 40-3-6 to -17 (1999); TEX. FAM. CODE ANN. §§ 3.001–.006 (Vernon 1998 & Supp. 2004); WASH. REV. CODE §§ 26.16.010–.124, .140–.150 (2004); WIS. STAT. §§ 766.001–.31 (2002). The first eight states have been community property states since they achieved statehood, reflecting their French or Spanish heritage. WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 1–3 (2d ed. 1971). Wisconsin adopted the community property approach in 1984 when it adopted the Uniform Marital Property Act. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 473 (6th ed. 2000); Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769, 769–70.

²⁰DUKEMINIER & JOHANSON, *supra* note 19, at 523.

²¹Although equal division of community property is now the norm in all of the community property states, it became the governing principle only after California introduced it in 1969. Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 299–304 (1987). Prior to that time, courts took fault into account when dividing the community property, leading to many unequal divisions. *Id.* However, equal division is now mandated in all cases in only three community property states: California, Louisiana, and New Mexico. See CAL. FAM. CODE § 2550; LA. REV. STAT. ANN. § 9:2801(4)(b) (1997 & Supp. 2005); *Michelson v. Michelson*, 520 P.2d 263, 266 (N.M. 1974). The other community property states require courts to employ only a presumption of equal or equitable division. See ARIZ. REV. STAT. ANN. § 25-318; IDAHO CODE ANN. § 32-712(1)(a); NEV. REV. STAT. § 125.150(1)(b) (2000); TEX. FAM. CODE ANN. § 3.005; WASH. REV. CODE § 26.16.140; WIS. STAT. § 767.255(3) (2001).

²²JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 386–87 (2001); D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 666–67 (2d ed. 2002); *Developments in the Law*, *supra* note 18, at 2092–93.

²³SINGER, *supra* note 22, at 380, 387.

²⁴WEISBERG & APPLETON, *supra* note 22, at 666.

the notions that the spouses "decide together how to use the time of each so as to maximize their income, and that they should share their earnings equally."²⁵ Each spouse's time and energy is thereby assumed to improve the marriage in some way, even if the market would not value such contributions. The classic example is the traditional division of labor between husband and wife, wherein the husband engages in work for wages while the wife stays at home to care for children and the household. However, the assumption of an equal division of earnings controls property ownership even in childless marriages or other marriages that do not conform to the traditional model.

B. Equitable Distribution: Deferred Partnership

In the remaining forty-one states, property accumulated by either spouse during marriage remains the separate property of that spouse whether the property is accumulated from earnings or other sources. In these states, known as separate property states, title governs the alienability of property while spouses remain married such that spouses can transfer all property titled in their individual names without seeking permission from the other spouse.²⁶ Traditionally, the same principle applied upon divorce. Spouses kept the property titled in their individual names and in many cases were not required to split it with the other spouse.²⁷ Rather, if a spouse, upon divorce, needed more property for living expenses than was titled in her name, courts would order alimony payments for a specified period of time or on an ongoing basis.²⁸ As such, the traditional distribution of property upon divorce in the separate property states was more about supporting a potentially destitute spouse than about recognizing a marital partnership.²⁹

²⁵DUKEMINIER & JOHANSON, *supra* note 19, at 473.

²⁶SINGER, *supra* note 22, at 380.

²⁷Of course spouses could reach divorce settlements under which property was transferred to the non-title-holding spouse, but such transfers were not required by the state default rules. For a discussion of the dynamics that would lead to such transfers prior to the introduction of no-fault divorce, see *infra* text accompanying notes 44–46.

²⁸See SINGER, *supra* note 22, at 382 (discussing use of alimony to support dependent spouse); Herma Hill Kay, *Beyond No-Fault*, in *DIVORCE REFORM AT THE CROSSROADS* 6, 12 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (stating that in most common law states, marital property was not divided at divorce). *But see* Fineman, *supra* note 7, at 804–05 (discussing how Wisconsin differed from most separate property states prior to 1984 because its courts had statutory authority to award husband's separate property to his wife upon divorce); Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 *FORDHAM L. REV.* 827, 831–37 (1988) (describing how some courts in early twentieth century mandated property division, instead of granting alimony, to support divorced spouses).

²⁹See, e.g., SINGER, *supra* note 22, at 382 ("Before the 1960s, alimony was routinely awarded to women who were thought to be dependent on their ex-husbands for income."); Frantz & Dagan, *supra* note 9, at 99–100 (noting that property division was about ownership and entitlement, whereas alimony was about need); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 *N.C. L. REV.* 1103, 1112 (1989) ("A divorced woman's 'entitlement' to alimony

The separate property states' current approach to property division upon divorce is dramatically different from the traditional approach. Over the past thirty years, all of the separate property states have adopted equitable distribution approaches that require courts to look beyond title when dividing property upon divorce. Under these approaches, courts are instructed to make an equitable distribution of virtually all of the property acquired by the spouses during marriage, which is referred to as marital property.³⁰ Therefore, although title continues to govern the ownership of property during the marriage, ownership is redefined at divorce.

In twelve of the separate property states, equitable distribution means, in most cases, that all marital property is divided equally upon divorce,³¹ much like what would happen in a community property state³² or in an economic partnership generally.³³ Indeed, this equitable distribution approach is often referred to as a "deferred community property" approach.³⁴ As such, upon divorce, spouses cannot automatically exercise control over the property titled in their own name. Rather, the default rules reallocate ownership so that, in most cases, each spouse leaves the marriage with close to one-half of the marital property, regardless of who held title to that property during marriage.

In the remaining twenty-nine separate property states, courts are given discretion to distribute the marital property equitably, meaning equal divisions

derived from her husband's duty of support during marriage. Only husbands were responsible for support; wives had other marital obligations.").

³⁰SINGER, *supra* note 22, at 381; WEISBERG & APPLETON, *supra* note 22, at 662–66. The property not subject to equitable distribution includes property obtained through inheritance or gift and, in some states, the appreciation of assets obtained before marriage. WEISBERG & APPLETON, *supra* note 22, at 664; *see also* Suzanne Reynolds, *Increases in Separate Property and the Evolving Marital Partnership*, 24 WAKE FOREST L. REV. 239, 299–328 (1989) (discussing why some separate property states consider appreciation of assets obtained before marriage to be marital property).

³¹Most of these twelve states employ a presumption of equal division, and the remaining states employ an equal division starting point, meaning that equal division is the norm but is not required in all cases. *See* ALASKA STAT. § 25.24.160(a)(4) (2004); ARK. CODE ANN. § 9-12-315(a)(1)(A) (2002); FLA. STAT. § 61.075(1) (2005); IND. CODE § 31-15-7-5 (2003); N.H. REV. STAT. ANN. § 458:16-a(II) (2004); N.C. GEN. STAT. § 50-20(c) (2003); OR. REV. STAT. § 107.105(1)(f) (2003); W. VA. CODE § 48-7-101 (2004); *Jackson v. Jackson*, 933 P.2d 1353, 1366 (Haw. Ct. App. 1997); *In re Marriage of Minear*, 679 N.E.2d 856, 864–65 (Ill. App. Ct. 1997); *Byington v. Byington*, 568 N.W.2d 141, 146–47 (Mich. Ct. App. 1997); *Booth v. Booth*, 541 N.E.2d 1028, 1031 (Ohio 1989).

³²SINGER, *supra* note 22, at 381–82.

³³For discussions comparing equitable distribution to distributions that occur at the end of business relationships, *see* Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 118–23 (2001); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 119–27 (1993); and Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 130, 130–39 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

³⁴BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* § 1.02, at 11 n.44 (2d ed. 1994); Bernstein, *supra* note 2, at 150; Newman, *supra* note 14, at 492 n.26.

of marital property are less likely to occur.³⁵ Instead, unequal divisions often result because courts are instructed to determine what constitutes an equitable distribution by taking into account tangible and intangible contributions to the acquisition of the marital property, need, job market skills, age, health, and, in some states, marital misconduct.³⁶ In addition, because the standards guiding the distribution can often be vague, courts have much room to determine that an unequal division is nonetheless equitable.³⁷ However, even in these states, ownership is redefined at divorce because spouses cannot automatically exercise control over the assets titled in their name, as they could during marriage, but rather must wait for the court to make an equitable distribution of the marital property.³⁸ Moreover, because courts must take into account nonfinancial contributions to the accumulation of marital property, even unequal but equitable divisions of property embrace a concept of marriage as a partnership similar to that employed in the community property states.³⁹

Accordingly, the forty-one separate property states now employ methods of equitable distribution that are consistent with the method of property distribution in the community property states.⁴⁰ All fifty states are thus guided,

³⁵See ALA. CODE § 30-2-51 (1989); COLO. REV. STAT. § 14-10-113 (2005); CONN. GEN. STAT. § 46B-81 (2004); DEL. CODE ANN. tit. 13, § 1513 (1999); GA. CODE ANN. § 19-5-13 (2004); IOWA CODE § 598.21 (2001); KAN. STAT. ANN. § 23-201 (2003); KY. REV. STAT. ANN. § 403.190 (West 1999); ME. REV. STAT. ANN. tit. 19-A, § 953 (2005); MD. CODE ANN., FAM. LAW §§ 8-201 to 214 (LexisNexis 2004); MASS. GEN. LAWS ch. 208, § 34 (2003); MINN. STAT. § 518.58 (2003); MISS. CODE ANN. § 93-5-23 (2004); MO. REV. STAT. § 452.330 (2003); MONT. CODE ANN. § 40-4-202 (2005); NEB. REV. STAT. § 42-365 (1999); N.J. STAT. ANN. § 2A:34-23 (West 2000); N.Y. DOM. REL. LAW § 236(5)(D) (McKinney 2003 & Supp. 2005); N.D. CENT. CODE § 14-05-24 (2004); OKLA. STAT. tit. 43, § 108 (2001); 23 PA. CONS. STAT. § 3502 (2001); R.I. GEN. LAWS § 15-5-16.1 (2003); S.C. CODE ANN. § 20-7-420 (1985); S.D. CODIFIED LAWS § 25-4-44 (1999); TENN. CODE ANN. § 36-4-121 (2001); UTAH CODE ANN. § 30-3-5 (1998 & Supp. 2005); VT. STAT. ANN. tit. 15, § 751 (2002); VA. CODE ANN. § 20-107.3 (2004); WYO. STAT. ANN. § 20-2-114 (2005).

³⁶See SINGER, *supra* note 22, at 381–82 (summarizing factors that judges may take into account when determining equitable distributions).

³⁷Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1556 (1984); Kay, *supra* note 28, at 12; Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms*, in *DIVORCE REFORM AT THE CROSSROADS* 191, 191–200 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

³⁸Or the court must approve a private settlement, the negotiation of which is necessarily informed by state default rules. In any event, spouses must wait for court action before they can legally exercise control over any marital property.

³⁹See *Developments in the Law*, *supra* note 18, at 2091 (“Since the 1960s, separate property states increasingly have embraced the partnership conception of marriage as well, and their schemes for division of property at divorce increasingly have mirrored those of community property states.”).

⁴⁰See *id.* at 2092 (“The adoption of equitable distribution statutes has made separate property states’ treatment of property at divorce virtually identical to that of community property states”); Herma Hill Kay, *Commentary: Toward a Theory of Fair Distribution*, 57 BROOK. L. REV. 755, 757 (1991) (discussing how separate property states have come to rely on community property principles when allocating property at divorce); Charles P. Kindregan, Jr. & Monroe L. Inker, *A Quarter Century of Allocating Spousal Property Interests: The*

at least to some degree, by a partnership theory of marriage when considering how to distribute property in the context of divorce, and most scholars and advocates have come to take the theory for granted. Indeed, most recent scholarship and policy proposals do not question the partnership theory, but instead focus on how both separate property and community property states can more faithfully implement the theory at divorce.⁴¹

C. The Path to Partnership

Two related phenomena prompted the move in the separate property states from a title-based approach to property division at divorce to an equitable distribution approach based on the partnership theory of marriage. First, states began to permit no-fault divorce beginning in the late 1960s after studies showed that couples increasingly manufactured fault to obtain divorces.⁴² The

Massachusetts Experience, 33 SUFFOLK U. L. REV. 11, 13 (1999) ("Today the concept of fairness in allocating property interests is universally accepted in the United States. This acceptance is reflected in an ever-expanding body of law in every state that provides for some form of either community property or equitable property assignment in divorce actions.").

⁴¹See, e.g., Frantz & Dagan, *supra* note 9, at 100–24 (proposing that justification for equal division of property upon divorce should be "based on the ideal of marriage as an egalitarian liberal community"); Kelly, *supra* note 13, at 160–208 (describing limitations of current constructions of partnership theory of marriage and proposing reforms); Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community*, 81 B.U. L. REV. 59, 62–64, 122–25 (2001) (discussing challenge of reconciling competing visions of marital community and individualism); Reynolds, *supra* note 30, at 328–33 (discussing increased expectations of marital partnership); Rhode & Minow, *supra* note 37, at 198–201 (suggesting that norms governing divorce should reflect commitment to equality for spouses and children); Silbaugh, *supra* note 17, at 100–10, 122–40 (proposing equivalent treatment of domestic and wage labor upon divorce); Singer, *supra* note 29, at 1117–21 (proposing post-divorce income sharing to better implement partnership theory of marriage); Cynthia Starnes, *Applications of a Contemporary Partnership Model for Divorce*, 8 BYU J. PUB. L. 107, 112–21 (1993) (proposing that contemporary partnership model will further reform law so that women who are primary caretakers do not alone bear costs of divorce); Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership and Divorce Discourse*, 90 IOWA L. REV. 1513, 1534–52 (2005) (arguing that partnership theory of marriage conveys message of empowerment and dignity to women). Some scholars have purported to critique the partnership theory of marriage, but their work primarily focuses on shortcomings in the implementation of the theory rather than objections to the core principles of the theory itself. See, e.g., Sally Burnett Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. REV. 195, 199–201 (1987) (proposing that difficulty in applying partnership theory of marriage comes from problems in equitably defining pool of divisible assets); Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 742–43 (1990) (discussing problems in classifying assets and difficulty in measuring human capital). The strongest critics of the partnership theory find fault with its presumption of an equal division of property when many women actually "over-participate" in marriage, as discussed *infra* Part IV, and spouses rarely share a total unity of interests. See MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 2–6, 29, 47 (1991); Kornhauser, *supra* note 13, at 1424–50.

⁴²See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CINN. L. REV. 1, 4–14, 26–44 (1987) (discussing impetus behind no-fault

rise of no-fault divorce necessarily meant that states' conceptions of marriage were changing in response to changing social norms.⁴³ Marriage was no longer an obligation binding in all but the most hurtful of situations. Rather, marriage came to be viewed by many individuals and ultimately the states as a partnership of affection that could be terminated in the absence of that affection, giving individuals another chance at personal fulfillment.⁴⁴

Second, the elimination of fault as a required basis for divorce in turn meant that spouses could no longer use fault as a bargaining tool if they were dissatisfied with a title-based division of property upon divorce. After the introduction of no-fault divorce, a spouse had no legal leverage to stop the other spouse from seeking a divorce and leaving with all of the property titled in his name. This led to the second phenomenon that prompted the move to the equitable distribution approach: studies showed that women suffered severe economic consequences upon the introduction of no-fault divorce, particularly when they had foregone wage-earning work in order to care for children and the household during marriage.⁴⁵ These studies prompted feminists to call for the reform of divorce law in accordance with the partnership theory of marriage, and states gradually responded affirmatively to those calls.⁴⁶

divorce movement). No-fault divorce, first introduced in California in 1969, is now available in all fifty states. *Id.* at 1–2; COTT, *supra* note 1, at 205–06; WEISBERG & APPLETON, *supra* note 22, at 564–68.

⁴³Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1942 (2000). Some scholars have criticized this move, arguing instead that the states should have reinforced the commitment of marriage. See e.g., Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1809–11, 1853–56 (1985) (“[B]efore no-fault divorce, a court discussed a petition for divorce in moral terms; after no-fault divorce, such a petition did not have to be discussed in moral terms.”); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 121–35 (showing problems of economic hardship on mothers and children and increase in divorce rate stemming from no-fault divorce reform movement).

⁴⁴COTT, *supra* note 1, at 206; Hamilton, *supra* note 2, at 341. For criticism of this reconceptualization of marriage, see Robert E. Rodes, Jr., *On Law and Chastity*, 76 NOTRE DAME L. REV. 643, 711–12 (2001); and Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503, 581–85.

⁴⁵See FINEMAN, *supra* note 41, at 53–75; LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 16–41, 323–56 (1985); Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 253 n.130, 254 (1997); Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *DIVORCE REFORM AT THE CROSSROADS* 75, 75 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 869–70 & n.171 (2004).

⁴⁶See COTT, *supra* note 1, at 206; Fineman, *supra* note 7, at 843–80; Monroe L. Inker & Margot Ames Clower, *Towards a New Justice in Marital Dissolution: The Massachusetts Statutory Scheme and Due Process Analysis*, 16 SUFFOLK U. L. REV. 907, 908 (1982); Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2066–68 (2000).

The equitable distribution approach did not immediately improve the financial situations of all women upon divorce due, in large part, to reductions in alimony awards that accompanied the introduction of the equitable distribution approach, as well as judicial inconsistency in determining what constituted equitable distribution.⁴⁷ However, as lawyers and judges became more familiar with equitable distribution, women who had foregone wage-earning work during marriage began to benefit under the approach because judges considered their nontangible contributions when determining equitable distribution awards.⁴⁸ At the very least, the equitable distribution default rules gave these women a much better bargaining position than they occupied at the introduction of no-fault divorce.⁴⁹ Most feminists now consistently consider women to be better off under the partnership principles of the equitable distribution approach than they were under the support principles of the title-based approach.⁵⁰

Although the partnership theory of marriage has now been uniformly embraced by feminists and others, there has been little scholarship concerning the elements of the theory.⁵¹ As such, it is not clear what the states' embrace of the partnership theory reveals about the states' conceptions of marriage. Based on the history discussed above, this Article posits that the partnership theory

⁴⁷Garrison, *supra* note 45, at 81–86, 88–99; Glendon, *supra* note 37, at 1556. *But see* Singer, *supra* note 29, at 1106–07 (showing that alimony awards declined only marginally in California after introduction of no-fault divorce, and that spouses in long-term marriages were more likely to receive alimony after introduction of no-fault divorce).

⁴⁸*See* FINEMAN, *supra* note 41, at 39–68 (describing how theories of contribution became central basis for sharing accumulated wealth at divorce).

⁴⁹Given that the financial condition of some divorced women deteriorated after the introduction of no-fault divorce, some scholars have argued that no-fault divorce should be eliminated or modified. *See, e.g.,* Milton C. Regan, Jr., *Law, Marriage, and Intimate Commitment*, 9 VA. J. SOC. POL'Y & L. 116, 118–24 (2001) (reasoning that women who sacrifice earning power during marriage risk serious financial disadvantage after divorce); Scott, *supra* note 43, at 1952–54, 1959–66 (advocating covenant marriage over no-fault divorce to protect women from financial risk). However, most scholars believe no-fault divorce has value and, therefore, seek to ensure that the property distribution problems that arose after the introduction of no-fault divorce be addressed by the reform of default property rules. *See, e.g.,* ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? 111–44 (1992) (arguing that property rules should be reformed to avoid meager financial awards for women). Other scholars have challenged the link between the feminization of poverty and the rise of no-fault divorce. *See, e.g.,* Singer, *supra* note 29, at 1104–13 (advocating post-divorce income sharing to achieve more equitable results).

⁵⁰*See, e.g.,* Kay, *supra* note 46, at 2066–68 (challenging notion that divorce reform led to economic disaster for women); Kelly, *supra* note 13, at 153–59 (recounting historical emergence of partnership theory of marriage); Singer, *supra* note 29, at 1113–15 (advocating expansion of partnership principles).

⁵¹The exceptions would be the work of Carolyn Frantz and Hanoch Dagan, although their work refers to marriage as an egalitarian liberal community as opposed to a partnership, and the recent work of Alicia Brokars Kelly. *See* Frantz & Dagan, *supra* note 9, at 104–06, 104 n.123; Kelly, *supra* note 13, at 173–75, 191–200; *cf.* Glendon, *supra* note 37, at 1557 (refusing to rest policy proposals on “some vague notion of partnership”).

can be viewed as illuminating at least three aspects of the states' current conceptions of marriage.⁵²

First, the partnership theory recognizes that marriage is no longer a hierarchal relationship, but rather is an enterprise freely chosen by two equal individuals.⁵³ As such, the theory distinguishes contemporary civil marriage from past forms of civil marriage that gave husbands the right to exercise economic and social power over their wives.⁵⁴

Second, despite the equality of contemporary civil marriage, the partnership theory also recognizes that spouses may contribute to the marriage in different ways. Spouses, usually wives, who contribute nontangible care work to the marriage⁵⁵ improve the well-being of the couple and its children, if the couple chooses to have children, even if the market does not value that work. The partnership theory provides a vehicle for acknowledging the value of such nontangible contributions by reclassifying property earned during marriage as either community property or marital property.⁵⁶

⁵²This Article focuses on the current implementation of the partnership theory only. Historically, the community property system was not motivated by a desire for equality, but rather by a desire to insulate a woman's separate property, often inherited from her father, from her husband's debts. Smith, *supra* note 41, at 701–06.

⁵³Given the social pressure to marry, particularly that experienced by women, some may question whether marriage is actually a freely chosen enterprise. Frantz & Dagan, *supra* note 9, at 86–87; Hillary Frey, *Why Ms. Independent Still Wants to Get Hitched: The Rules of Attraction*, NATION, July 5, 2004, at 42, 42. However, even conceding that individual agency may be constrained with respect to the marriage decision, it is beyond dispute that marriage is now much more freely chosen than it was previously.

⁵⁴For a discussion of the patriarchal nature of these past forms of civil marriage, see SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 134–69 (1989); Cahn, *supra* note 45, at 246–48; and Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1523, 1530–35 (1983). For a discussion of how current laws regulating divorce and marriage maintain some inequalities between spouses, see Hasday, *supra* note 45, at 868–70.

⁵⁵For discussions of various types of this care work, see sources cited *supra* note 17.

⁵⁶*See, e.g.*, Ferguson v. Ferguson, 639 So. 2d 921, 929 (Miss. 1994) (en banc) (“[H]ome-maker contributions are not to be measured by a mechanical formula, but on the contribution to the economic and emotional well-being of the family unit.”); Kelly, *supra* note 13, at 198 (describing ideal marital partnership theory as recognizing that “home-based contributions and market-based contributions must both be recognized as valuable to the family’s joint welfare by giving rise to a legal entitlement (a property right) to share in whatever wealth is produced during marriage”); Rhode & Minow, *supra* note 37, at 199 (“Guided by a partnership vision, divorce law can take account of the interaction between the private choices of divorcing parties and the broader public policies and marketplace discrimination that have influenced such choices.”). Given this acknowledgment of nontangible contributions, the partnership theory can be seen as rewarding specialization within the marriage. *See, e.g.*, June R. Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 988–1004 (1991) (discussing efficient division of labor and allocation of resources in marriage). For a general discussion of specialization in marriage, see GARY S. BECKER, A TREATISE ON THE FAMILY 14–37 (1981). Such specialization, or gender role division, is discussed in more depth in Part IV, *infra*.

Finally, the partnership theory posits that equal division is generally the best way to distribute community property or marital property at the end of a marriage.⁵⁷ This preference for equal division could be viewed as equally valuing the tangible and nontangible contributions to a marriage.⁵⁸ However, given that nontangible contributions by definition have no market value, this conceptualization seems implausible.⁵⁹ Alternatively, the preference for equal division could be viewed as promoting cooperation and sharing within the marriage, and limiting incentives for financial opportunism and oppression.⁶⁰ Or, in other words, equal division could be employed as a tool for reinforcing the first aspect of marriage illuminated by the partnership theory: marriage as an enterprise freely chosen, and then experienced, by two equal individuals.

⁵⁷See Kelly, *supra* note 13, at 170 (describing as “core partnership principles” notion “that each spouse provides a set of different, but equally meaningful contributions to the marital estate,” and stating that partnership theory “recognizes the equal dignity and value of each spouse’s contribution to the marriage”). As discussed *supra* text accompanying notes 35–39, in some separate property states, equitable distribution does not always mean equal division. However, most proponents of the partnership theory believe these states have failed to embrace the partnership theory completely. See, e.g., Rhode & Minow, *supra* note 37, at 200 (showing that most states have not fully embraced the partnership theory because husbands generally end up with “the majority of the marital property as well as with greater earning potential”). As such, although unequal divisions occur, they are not the product of the partnership theory as described in this Article. If marriage were conceived solely as an economic partnership, as opposed to the broader conception of partnership described above, then unequal divisions would be consistent with that conception. See, e.g., MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* 145 (1999) (discussing some payments at divorce that represent satisfaction of debt incurred to economic partner as opposed to payments dividing marital partnership).

⁵⁸See Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 396–97 (“One significant aspect of the no-fault reconstruction of the family narrative is the characterization of marriage as a partnership between equals. Each makes contributions to the relationship which, although they may be different in kind, are of equal worth.”); Kelly, *supra* note 13, at 173, 199 (“[H]ome labor should be accorded equal status to market labor, emphasizing that work at home—disproportionately performed by women—must be accorded the same respect and value within marriage as market work.”).

⁵⁹See, e.g., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 3, § 4.09 cmt. c, at 735–36 (stating that it is difficult to attach monetary value to nonfinancial contributions); Frantz & Dagan, *supra* note 9, at 102–03 (discussing confusion exemplified by equal division rule requiring assignment of external values to all marital contributions).

⁶⁰Frantz & Dagan, *supra* note 9, at 95–96, 103–06; Kay, *supra* note 28, at 30–31; Susan W. Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1, 13–19 (1977); Rhode & Minow, *supra* note 37, at 199; see also Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2387–88 (1994) (“Equalizing the parties’ standard of living for some period after divorce affirms that spouses have a special responsibility to each other, that each has made valuable contributions to the marriage and to the other’s welfare, and that reconstructing marriage on exchange terms generally is an undesirable basis for determining the amount of a divorce award.”). For a discussion of potentially opportunistic behavior within marriage, see Lloyd Cohen, *Divorce, Marriage, and Quasi Rents: Or, “I Gave Him the Best Years of My Life”*, 16 J. LEGAL STUD. 267, 287–95 (1987).

However, if the states conceive of marriage as an equal partnership, then presumably property would be divided equally at the end of every marriage, regardless of the method of marital dissolution. This is not the case; the partnership theory of marriage does not consistently govern the distribution of property when a marriage ends by the death of a spouse. Instead, as set forth in Parts II and III below, the default rules governing the distribution of property at death vary considerably from state to state, and few states employ default rules that are consistent with a partnership theory of marriage. Parts II and III explore how these rules complicate the conceptions of marriage discussed above.

II. WHEN A SPOUSE DIES WITH A WILL

When a marriage ends by the death of a spouse, property accumulated during the marriage is distributed much differently than it would have been upon divorce. Most notably, and described in detail below, none of the separate property states employ the concept of marital property at death. Instead, property is distributed according to various default rules that differ, on the first order, according to whether the deceased spouse died with or without a valid will.

If an individual dies with a will, that will governs the distribution of the individual's property at death. So long as the will was validly executed,⁶¹ almost no one can make claims against the will's terms, including the individual's children,⁶² unless the individual was married. If the individual was married at death, in every state the surviving spouse can make claims to the deceased spouse's estate even if such claims are at odds with the will's terms.⁶³

⁶¹In order for a will to be validly executed, it must have been executed with the requisite mental capacity and testamentary intent; be free of the taint of undue influence, fraud, and duress; and conform to the requirements of execution set forth by the states. For a general discussion of these requirements, see DUKEMINIER & JOHANSON, *supra* note 19, at 159–275.

⁶²The primary exception in most states would be children born to or adopted by the individual after the execution of the individual's will. See DUKEMINIER & JOHANSON, *supra* note 19, at 545–48. These children are entitled to a portion of their deceased parent's estate even if the parent's will does not provide for them. *Id.* A minority of states extend this protection to children born before execution of the will who are not explicitly disinherited by the will's terms. *Id.* Otherwise, parents may disinherit their children without limitation in every state except Louisiana, where parents may not disinherit children under the age of twenty-three or children with disabilities. *Id.* at 536 n.17. In addition, family members not falling into any of the categories described above may, in some circumstances, petition the estate for homestead and family allowances. *Id.* at 476–78. However, such allowances are minimal in comparison with the entitlements of children described above or the entitlements of spouses discussed later in this Article. For a discussion of the justifications behind testamentary freedom in general, see Adam J. Hirsh & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6–14 (1992).

⁶³As set forth *infra* Part II, the claims permitted to be made vary widely from state to state. Georgia is the least generous, giving surviving spouses the right to claim only one year of support. See *infra* text accompanying notes 72–74 (discussing Georgia inheritance law). In

This right is extended only to spouses who were legally married at the time of death or, in a few states, were registered with the state as domestic partners.⁶⁴ Individuals who function as spouses yet do not enjoy the legal status of spouse or domestic partner have no right to make claims against the deceased spouse's will.⁶⁵

Accordingly, like the default rules governing property division at divorce, these inheritance rights benefit spouses only, yet they also constrain spouses' ability to act independently. Through such constraints, the states impose their conceptions of marriage on married individuals. As set forth below, such conceptions vary greatly depending on whether the state in question is a community property or separate property state.

A. *Community Property: Partnership at All Times*

The nine community property states⁶⁶ distribute a deceased spouse's estate in the same way that they would distribute that spouse's property upon divorce. The death of a spouse dissolves the community just like a divorce would dissolve the community. Upon dissolution, the surviving spouse is generally given her half of the community property,⁶⁷ and the states respect the

contrast, in the community property states there is a right to claim one-half of the assets accumulated from wages during marriage. *See infra* text accompanying notes 66–69 (discussing inheritance law in community property states). Further, in Colorado, Hawaii, Kansas, Montana, Nebraska, North Dakota, South Dakota, and West Virginia, there is a right to claim up to one-half of the deceased spouse's augmented estate. *See infra* text accompanying notes 87, 90–91 (discussing inheritance law in these states).

⁶⁴The states that extend inheritance rights to registered domestic partners or the equivalent are California, Hawaii, Maine, and Vermont. *See supra* note 4 (discussing states that grant inheritance rights to individuals other than those who occupy legal status of spouse). In addition, New Hampshire grants inheritance rights to some cohabitating couples. *See supra* note 4 (listing statutory provisions granting inheritance rights to nonmarried partners).

⁶⁵*See, e.g., In re Estate of Cooper*, 592 N.Y.S. 2d 797, 799–801 (N.Y. App. Div. 1993) (refusing to extend elective share protection to surviving member of same-sex couple). *But cf. In re Estate of Vargas*, 111 Cal. Rptr. 779, 781 (Cal. Ct. App. 1974) (invoking principles of equity to split estate between deceased spouse's two "spouses" because second putative spouse in good faith believed she was legal spouse of deceased spouse and functioned in that manner). For a criticism of this reliance on legal status instead of function or need in inheritance law, see Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 229–35 (2001).

⁶⁶As discussed *supra* note 19, these states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

⁶⁷Similar to the context of divorce, the surviving spouse may end up with more or less than half of the community property if the couple migrated between community property and separate property states throughout the marriage, or if the surviving spouse agreed to count lifetime gifts as community property, agreed to a widow's election will, or otherwise entered into a prenuptial agreement. For general discussions of these possibilities, see DUKEMINIER & JOHANSON, *supra* note 19, at 521–30; and *Developments in the Law*, *supra* note 18, at 2095–98. These exceptions, however, do not change the general principle that community property is to be divided equally between the spouses at either divorce or death.

power of the deceased spouse to give the other half of the community property to anyone he desires, if done through the execution of a valid will.⁶⁸ Similarly, the deceased spouse may give his separate property to anyone specified in a valid will, while the surviving spouse keeps all of her separate property.⁶⁹

Accordingly, in the nine community property states, the distribution of property accumulated from wages during a marriage is governed by the same partnership theory of marriage whether the marriage ends by divorce or death. The nine states' default rules thus reflect consistent conceptions of marriage as a partnership of two equals.

B. Elective Shares: Partnership or Support?

In contrast, the default rules in the forty-one separate property states reflect conceptions of marriage that differ, often significantly, depending on whether the marriage ends by divorce or death. Unlike the community property states, no separate property state distributes a spouse's property at death in the same way it would at divorce. In addition, as described in more detail below, no separate property state has fully embraced the partnership theory of marriage in its default inheritance rules.

No separate property state has imported to the context of death the system of equitable distribution of marital property that has come to govern property distribution in the context of divorce. Ownership of assets is not redefined at the end of the marriage as would now happen at divorce in all separate property states. Instead, title largely governs the distribution of a married individual's property at death, much like the way that title used to govern the distribution of property at divorce.⁷⁰ The states thus respect the deceased spouse's power to devise, through a will, the property titled in his name.

The power to devise is not complete in the separate property states, however. In every separate property state, state law gives surviving spouses the right to make claims against their deceased spouses' estates, even if the deceased spouses explicitly disinherited them.⁷¹ In one state, Georgia, this right is one of support only: surviving spouses are entitled to an allowance from the deceased spouse's estate designed to cover the surviving spouse's living

⁶⁸DUKEMINIER & JOHANSON, *supra* note 19, at 521–24.

⁶⁹*Id.*

⁷⁰*See supra* text accompanying notes 27–29 (discussing spousal retention of property titled in spouses' names under traditional divorce law).

⁷¹As in the context of divorce, couples may contract around these default rules by entering into valid prenuptial agreements. *See Developments in the Law, supra* note 18, 2095–98. However, a will itself does not serve to contract around such default rules because it is a unilateral document. Wills are the documents of individual testators, and no state requires testators to share the terms of their wills with their spouses or anyone else. The terms of a will must be made public only upon the testator's death.

expenses during the first year after the deceased spouse's death.⁷² After the first year, the surviving spouse has no right to make additional claims to the property that was titled in the deceased spouse's name.⁷³ As such, the inheritance law in Georgia is much like pre-1970s divorce law.⁷⁴ Surviving spouses are entitled to limited support, much like alimony, but they are not entitled to a share of the property accumulated from wages during marriage if that property was titled in the deceased spouse's name.

In the other forty separate property states, surviving spouses are entitled to claim a share of the property titled in their deceased spouses' names. By redistributing property between spouses, these elective share, or forced share, laws could be seen as being consistent with the partnership theory of marriage underlying the community property and equitable distribution approaches. In the past, however, the elective share laws fell short of implementing the partnership theory of marriage in two fundamental ways. First, the laws gave surviving spouses much less than one-half of the deceased spouse's estate.⁷⁵ Second, the share was taken from only that property titled in the deceased spouse's name that was subject to the probate process (hereinafter referred to as the traditional probate estate). As such, the share was often not taken from all of the property accumulated from wages during the marriage because the traditional probate estate did not include property titled in the surviving spouse's name⁷⁶ or property titled in the deceased spouse's name but not subject to the probate process.⁷⁷ The estate was therefore much more narrowly defined than the current definitions of marital property or community property employed in the context of divorce. Thus, elective share laws historically were motivated more by a desire to support a potentially destitute surviving spouse rather than a desire to acknowledge equal partners' contributions to the marital enterprise.

Some of the forty states have attempted to modify their elective share laws so that they function more like the community property and equitable distribution approaches in the context of divorce. Accordingly, in a few of the separate property states, property distribution at death now comes close to

⁷²See GA. CODE ANN. §§ 53-3-7, -4-1 (1997 & Supp. 2003). For a brief discussion of why Georgia chose to abolish the elective share, see Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 47 n.68 (1994).

⁷³GA. CODE ANN. § 53-3-1.

⁷⁴See *supra* text accompanying notes 27–29 (noting that traditional distribution of property in separate property states was more about supporting potentially destitute spouses than recognizing marriage as partnership).

⁷⁵The laws historically gave spouses the right to only a third of the deceased spouse's probate property. In addition, up until the twentieth century, this one-third share was in the form of a life estate rather than in fee simple. CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 85 (1987).

⁷⁶DUKEMINIER & JOHANSON, *supra* note 19, at 507–13.

⁷⁷Such “nonprobate” property includes joint tenancies, accounts held with others, trusts, inter vivos transfers made before death, and life insurance policies. *Id.* at 34–35, 480–83, 500–13.

distribution upon divorce, reflecting a move from a support theory toward a partnership theory. However, in most separate property states, surviving spouses continue to be guaranteed much less property pursuant to the elective share statutes than they would have likely received upon divorce, indicating that most states have not come close to embracing a partnership theory of marriage in the context of death.

In the discussion below, the forty separate property states with elective share laws are grouped according to the extent to which they embrace the partnership theory of marriage that underlies the community property and equitable distribution approaches. In order for elective share laws to serve the same function as the community property or equitable distribution approaches in the context of divorce, such laws would have to give the surviving spouse an equal or equitable amount of all of the property acquired by the wages of both spouses during marriage, much like community property or marital property is defined in the context of divorce. None of the elective share laws currently meets this threshold because none of the laws adequately redefines property ownership at death to reflect a community property or marital property definition. However, the elective share laws in some states come closer to meeting this threshold than others.

1. Augmented Estates: Toward Partnership

The elective share laws that come closest to embracing the partnership theory of marriage are those found in ten states⁷⁸ that award the surviving spouse a share of the deceased spouse's "augmented estate" as defined in the elective share scheme proposed by the 1990 amendments to the Uniform Probate Code ("UPC").⁷⁹ This augmented estate is much more broad than the traditional probate estate, including nonprobate property⁸⁰ and property titled

⁷⁸As discussed in more detail below, the ten states are Alaska, Colorado, Hawaii, Kansas, Minnesota, Montana, North Dakota, South Dakota, Utah, and West Virginia. See *infra* note 81 (providing information on these states' definitions of "augmented estates" and listing statutory citations).

⁷⁹UNIF. PROBATE CODE § 2-202 (amended 1993). For brief discussions of the rationale behind adopting the concept of the augmented estate, see Waggoner, *supra* note 72, at 59–61; and Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 253 (1991).

⁸⁰The property considered to be part of the augmented estate even though it is not subject to the probate process includes, *inter alia*, the deceased spouse's interest in property held by the deceased spouse in joint tenancy with the right of survivorship, the deceased spouse's interest in accounts held with others, and various property gratuitously transferred by the deceased spouse before death, but during the marriage. UNIF. PROBATE CODE § 2-202. The last category includes transfers in which the deceased spouse retained the right to possession or enjoyment of the transferred property, or alone retained a presently exercisable power of appointment; transfers in which the deceased spouse created a power over the income or principal of the transferred property for the benefit of the deceased spouse, his creditors, or his estate; and any transfer of property made by the deceased spouse in the two years preceding his death to a person other than the surviving spouse. *Id.*

in either spouse's name, as opposed to consisting solely of property titled in the deceased spouse's name that was subject to probate.⁸¹ The augmented estate thus comes close to replicating community property or marital property.⁸² Indeed, the UPC drafters explained that the augmented estate "is the first step in the overall plan of implementing a partnership or marital-sharing theory of marriage."⁸³

However, as other commentators have pointed out, the definitions of the augmented estate in the ten states and in the UPC proposal are not coextensive with the definitions of community property employed in the community property states or the definitions of marital property employed in the separate property states in the context of divorce.⁸⁴ Rather, the augmented estate is defined to include some separate property that would not be considered community property or marital property. For example, property is frequently included in the augmented estate even if either spouse owned that property before marriage⁸⁵ or inherited or otherwise gratuitously received that property

⁸¹The ten states' definitions of an augmented estate are all based on the UPC proposal, but each has slight variations. Most notably, Montana, North Dakota, and West Virginia exclude from the augmented estate life insurance paid to others than the surviving spouse, whereas the other seven states include such payouts in the augmented estate. See ALASKA STAT. § 13.12.203 (2002); COLO. REV. STAT. § 15-11-202 (2004); HAW. REV. STAT. § 560:2-203 (2004); KAN. STAT. ANN. § 59-6a203 (2003); MINN. STAT. § 524.2-203 (2002); MONT. CODE ANN. § 72-2-222 (2003); N.D. CENT. CODE § 30.1-05-02 (1996 & Supp. 2003); S.D. CODIFIED LAWS § 29A-2-203 (1997); UTAH CODE ANN. § 75-2-203 (1993 & Supp. 2003); W. VA. CODE § 42-3-2 (1997 & Supp. 2003).

⁸²The augmented estate also prevents some overcompensation of surviving spouses who already had marital assets titled in their names. UNIF. PROBATE CODE art. II, pt. 2, gen. cmt. (amended 1997). "If the elective-share percentage were to be applied only to the *decedent's* assets, a surviving spouse who has already been overcompensated in terms of the way the couple's marital assets have been nominally titled would receive a further windfall under the elective-share system." *Id.* As such, surviving spouses with more than the designated percentage of the augmented estate titled in their names are not entitled to take under the elective share. However, surviving spouses are not required to give the surplus to their deceased spouses' estates. For further discussion of potential overcompensation, see *infra* text accompanying notes 105-06, 141.

⁸³UNIF. PROBATE CODE § 2-202 cmt. In addition, the American Law Institute cited the UPC as a model for its proposal to extend the partnership theory of marriage to all cohabitating couples who do not execute agreements to the contrary. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 3, §§ 4.12 cmt. b, 5.04 cmt. c.

⁸⁴For an expanded discussion of this problem in the UPC proposal, see Gary, *supra* note 14, at 584-87; Newman, *supra* note 14, at 503-04, 512-13; Vallario, *supra* note 14, at 551; and Waggoner, *supra* note 14, at 6-7, 30 n.52.

⁸⁵In Colorado there is one exception. Interests in real property held in joint tenancy with the right of survivorship, whether held by the deceased spouse or the surviving spouse, are not included in the augmented estate if the joint tenancies were created prior to the marriage. See COLO. REV. STAT. § 15-11-202(3)(e), (h) (2004). This exception makes Colorado's elective share scheme come closer to an equitable distribution scheme or community property scheme than do the elective share laws in the other nine states.

during marriage.⁸⁶ As such, the definitions of the augmented estate do not solely include property accumulated by the joint efforts of the married couple.

In addition to this problem with the scope of the augmented estate, the elective share laws in nine of the ten states also fall short of embracing the partnership theory of marriage because they often award less than one-half of the augmented estate to the surviving spouse. Indeed, only North Dakota awards one-half of the augmented estate to all surviving spouses.⁸⁷ Given that separate property can be included in the augmented estate, it could be consistent with the partnership theory to award less than one-half of the augmented estate in those cases where separate property is subject to the elective share. North Dakota could thus be seen as overcompensating surviving spouses when significant amounts of deceased spouses' separate property are included in the augmented estate. However, the nine states that award less than one-half of the augmented estate do not condition the reduction on whether a deceased spouse had separate property that was included in the augmented estate.

First, in Alaska and Utah the surviving spouse always receives a flat one-third of the augmented estate, regardless of the actual property that was included in that augmented estate.⁸⁸ Therefore, if neither spouse had significant amounts of separate property that was included in the augmented estate, the surviving spouse, by receiving only one-third of the augmented estate, can receive much less than one-half of the property accumulated from wages during marriage. Surviving spouses who opt to take an elective share in these states will receive one-half of the property accumulated from wages during marriage only in those instances where the deceased spouse's separate property makes up a sufficiently large percentage of the augmented estate, and the surviving spouse's separate property makes up a sufficiently small percentage of the augmented estate, such that a third of the augmented estate equals one-half of the assets accumulated from wages during marriage.

Second, in the remaining seven states the surviving spouse receives a variable portion of the augmented estate based on the length of the marriage, as recommended by the UPC.⁸⁹ Colorado's elective share law, for instance, gives a surviving spouse one-half of the augmented estate if the marriage lasted ten

⁸⁶There are exceptions in Colorado, Hawaii, and Utah. In Colorado, interests in real property held in joint tenancies with the right of survivorship are not included in the augmented estate, whether held by the deceased spouse or the surviving spouse, if the joint tenancies were created by someone other than the deceased spouse or the surviving spouse. *See id.* § 15-11-202(3)(f), (g). In Hawaii, gifts in general are not included in the augmented estate, making Hawaii's elective share scheme much closer to an equitable distribution or community property scheme in this respect. *See* HAW. REV. STAT. § 560:2-208 (2003). Finally, in Utah, most of the deceased spouse's separate property is excluded. *See* UTAH CODE ANN. § 75-2-208 (1993 & Supp. 2003).

⁸⁷*See* N.D. CENT. CODE § 30.1-05-01 (1996).

⁸⁸*See* ALASKA STAT. § 13.12.202 (2002); UTAH CODE ANN. § 75-2-202 (1993 & Supp. 2004).

⁸⁹*See* UNIF. PROBATE CODE § 2-202 (amended 1993).

or more years,⁹⁰ whereas the elective share laws found in Hawaii, Kansas, Minnesota, Montana, South Dakota, and West Virginia give a surviving spouse one-half of the augmented estate if the marriage lasted fifteen or more years.⁹¹ All seven states award smaller percentages of the augmented estate for shorter marriages, graduated by the number of years of marriage, yet guarantee the surviving spouse a minimum amount regardless of the length of the marriage or the size of the estate.⁹²

The UPC explains that such graduated shares “implement[] the partnership theory by increasing the maximum elective-share percentage of the augmented estate to fifty percent, but by phasing that ultimate entitlement in so that it does not reach the maximum fifty-percent level until the marriage has lasted at least fifteen years.”⁹³ The guaranteed minimum provides a “support theory back-up.”⁹⁴ However, graduated shares would not be necessary to implement the partnership theory if the seven states employed definitions of augmented estates that were coextensive with definitions of community property or marital property. If such definitions were employed, then in order to implement the partnership theory the seven states would need only to award the surviving spouse one-half of the augmented estate as redefined to consist of one-half of the property accumulated from wages during the marriage, regardless of the length of the marriage.⁹⁵

Because the seven states do not redefine ownership at death in a manner consistent with the definitions of community property or marital property, they use the length of the marriage as a proxy for the surviving spouse’s entitlement. The rationale for this proxy is that the separate property included in the augmented estate should, over time, be viewed as joint property, given both spouse’s contributions to the marriage.⁹⁶ However, the proxy is used even in those instances when no separate property is included in the augmented estate. In addition, the length of a marriage is not always a good measure of contributions to the marriage. Most obviously, an automatic calculation based on the length of the marriage can undervalue the contributions of a newlywed who gave up a job to raise children and support the other spouse’s career only to have the marriage end by death after a few years.⁹⁷ Conversely, the

⁹⁰See COLO. REV. STAT. § 15-11-201.

⁹¹See HAW. REV. STAT. § 560:2-202; KAN. STAT. ANN. § 59-6a202 (1994); MINN. STAT. ANN. § 542.2-202 (West 2002); MONT. CODE ANN. § 72-2-221 (2003); S.D. CODIFIED LAWS § 29A-2-202 (1997); W. VA. CODE § 42-3-1 (2003).

⁹²In West Virginia the guaranteed minimum is \$25,000; in the other states it is \$50,000. See *supra* notes 90–91 (listing supportive statutory citations).

⁹³UNIF. PROBATE CODE § 2-202 cmt.

⁹⁴*Id.*

⁹⁵For an extended discussion of this alternative, see Newman, *supra* note 14, at 523–36.

⁹⁶Waggoner, *supra* note 72, at 52–53; Waggoner, *supra* note 79, at 247–51.

⁹⁷For a more complete discussion of this problem with respect to the UPC proposal, see Turano, *supra* note 14, at 1004–06. Cf. Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 768–79 (1993) (discussing how younger caregivers have not benefited from changes in alimony and divorce law).

automatic calculation can overvalue the contributions of a non- or low-wage-earning spouse who pursued independent hobbies while care work for the family was provided by paid employees, or the other spouse, over the course of a long marriage.

Accordingly, the ten states that award elective shares from augmented estates fall short in implementing the partnership theory of marriage in two fundamental ways. First, the elective share is not taken solely from the property accumulated from wages during marriage, but rather is taken from a set of property that can include separate property. Second, even when separate property is not included, surviving spouses in nine of the ten states often receive less than one-half of the property accumulated from wages during marriage. As set forth below, however, the elective share laws in the remaining thirty-one states are even farther from embracing the partnership theory of marriage.

2. *Partially Augmented Estates: Away from Partnership*

The elective share laws in nine other states⁹⁸ allow surviving spouses to take a share from an estate that is defined to include more property than was included in the traditional probate estate,⁹⁹ but not as much property as is included in the augmented estates described above.¹⁰⁰ These estates will therefore be referred to as “partially augmented estates.”

Elective shares taken from partially augmented estates could be consistent with the partnership theory of marriage if the estates included all of the property included in augmented estates except for separate property. None of the nine states follows this approach. First, the definition of estate excludes property that would have been considered to be part of an augmented estate, or to be community property or marital property in the context of divorce. Most notably, the definition excludes property that the surviving spouse accumulated from her own wages during marriage and kept titled in her own name.¹⁰¹ In addition, the definition also excludes some property owned by the deceased spouse but not subject to the probate process.¹⁰² Second, although the definition of estate excludes the separate property of the surviving spouse,¹⁰³

⁹⁸As discussed in more detail *infra* notes 101–12, these states are Delaware, Florida, Maine, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, and Virginia.

⁹⁹For discussion of the traditional probate estate, see *supra* text accompanying notes 76–77

¹⁰⁰See *supra* text accompanying notes 78–86 (discussing definitions of augmented estates).

¹⁰¹For more details about this exclusion, see *infra* note 103.

¹⁰²For example, Maine, Nebraska, and New Jersey exclude insurance proceeds, joint annuities, and pensions payable to persons other than the surviving spouse. See ME. REV. STAT. ANN. tit. 18-A, § 2-202 (1964); NEB. REV. STAT. § 30-2314(c)(1) (1995); N.J. STAT. ANN. § 3B:8-3 (West 1983). Pennsylvania excludes insurance proceeds and pensions. 20 PA. CONS. STAT. ANN. § 2203 (West 2005). By implication, these exclusions apply even if the property was derived from wages during marriage.

¹⁰³Delaware, Florida, North Carolina, Pennsylvania, and Virginia exclude all property titled in the surviving spouse's name by implication, unless that property passed to the surviving

the definition of estate in all but one of the states includes all property of the deceased spouse that is subject to the probate process, including separate property.¹⁰⁴

The elective share laws in these nine states are thus even farther from implementing the partnership theory of marriage than are the elective share laws in the nine states that employ the concept of the augmented estate. First, surviving spouses can be overcompensated and receive more than one-half of the property accumulated from both spouses' wages during marriage because of the failure to include in the partially augmented estate property the surviving spouse earned from wages during marriage and kept titled in her name. For example, if the surviving spouse consistently out earned the deceased spouse throughout the course of the marriage and each spouse kept the property from his or her wages titled in his or her name, then at death the surviving spouse would keep all of her property¹⁰⁵ plus have a right to take a share of the deceased spouse's property, amounting to more than one-half of the property accumulated from wages during the marriage. The nine states' elective share laws attempt to address potential overcompensation by including in the partially augmented estate property passing from the deceased spouse to the surviving spouse through gift or nonprobate means,¹⁰⁶ but such measures do not address the overcompensation that could occur by excluding property the surviving spouse accumulated from wages and kept titled in her name.

Second, surviving spouses can be undercompensated because all nine states fail to ensure that all of the property the deceased spouse accumulated from wages during marriage is included in the partially augmented estate,¹⁰⁷ and eight of the nine states potentially give the surviving spouse less than one-

spouse at the decedent's death. *See* DEL. CODE ANN. tit. 12, § 903 (2001); FLA. STAT. § 732.2035 (2003); N.C. GEN. STAT. § 30-3.2(4) (2003); 20 PA. CONS. STAT. ANN. § 2203(a)(1) (West 2005); VA. CODE ANN. § 64.1-16.1 (2003). Maine, Nebraska, New Jersey, and New York, by implication, exclude all property of the surviving spouse that was "not derived" from the deceased spouse. *See* ME. REV. STAT. ANN. tit. 18-A, § 2-202 (1964); NEB. REV. STAT. § 30-2314(a)(2) (2003); N.J. STAT. ANN. § 3B:8-9 (West 1983); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1999). Of course each type of exclusion can include both separate property and property accumulated from wages during the marriage.

¹⁰⁴The exception is found in Virginia where the deceased spouse's separate property is excluded so long as the deceased spouse maintained the property as separate property and did not receive it from the surviving spouse. VA. CODE ANN. § 64.1-16.1 (2003).

¹⁰⁵*See supra* note 103 (enumerating statutes that discuss property titled in surviving spouse's name).

¹⁰⁶*See supra* notes 102-03 (enumerating statutes that delineate property that should be included in augmented estate).

¹⁰⁷*See supra* notes 102-103 (enumerating statutes that allow exceptions to property included in augmented estate). Of course such undercompensation can be offset if the deceased spouse has separate property that is included in the partially augmented estate, or if the surviving spouse accumulated property from her own wages during marriage and kept that property titled in her own name.

half of the partially augmented estate.¹⁰⁸ Indeed, in only one of the nine states, Nebraska, is the surviving spouse always awarded one-half of the partially augmented estate.¹⁰⁹ In three of the states the percentage of the partially augmented estate given to the surviving spouse depends on whether the deceased spouse left children or descendants of children (hereinafter referred to collectively as children). In New York and Virginia, the surviving spouse may take one-third of the partially augmented estate if the deceased spouse left a child, and one-half of the partially augmented estate if the deceased spouse left no children.¹¹⁰ In North Carolina, the surviving spouse may take one-third of the partially augmented estate if the deceased spouse left two or more children, and one-half if the deceased spouse left no or one child.¹¹¹ The remaining five states simply award the surviving spouse one-third of the partially augmented estate irrespective of whether the deceased spouse left children.¹¹²

Giving the surviving spouse less than half of the partially augmented estate can effectuate equal sharing of the property accumulated from wages during marriage only in those instances where a sufficient amount of the deceased spouse's separate property is included in the partially augmented estate,¹¹³ or where the surviving spouse kept title to sufficient amounts of property accumulated from her own wages during the marriage,¹¹⁴ and where the deceased spouse did not have sufficient amounts of property from wages excluded from the partially augmented estate.¹¹⁵ If these conditions are not present, the surviving spouse can receive less than one-half of the property accumulated from wages during marriage in eight of the nine states. In addition, if a sufficient amount of the deceased spouse's property from wages was not subject to the elective share (because it was not included in the partially augmented estate), the surviving spouse can receive less than one-half

¹⁰⁸See DEL. CODE ANN. tit. 12, § 901(a) (2001); FLA. STAT. § 737.2065 (2003); ME. REV. STAT. ANN. tit. 18-A, § 2-201 (1964); N.J. STAT. ANN. § 3B:8-1 (West 1983); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(a)(1)(A) (McKinney 1999); N.C. GEN. STAT. § 30-3.1(a) (2003); 20 PA. CONS. STAT. ANN. § 2203(a) (West 2005); VA. CODE ANN. § 64.1-16 (2003).

¹⁰⁹See NEB. REV. STAT. § 30-2313(a) (1995).

¹¹⁰See N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(a)(1)(A); VA. CODE ANN. § 64.1-16.

¹¹¹See N.C. GEN. STAT. § 30-3.1(a). However, if the surviving spouse is a second or successive spouse and the deceased spouse has children from prior relationships but none from his relationship with the surviving spouse, the one-half or one-third share is reduced by half. N.C. GEN. ST. § 30-3.1(b).

¹¹²See DEL. CODE ANN. tit. 12, § 901(a); FLA. STAT. § 732.2065; ME. REV. STAT. ANN. tit. 18-A, § 2-201 (1964); N.J. STAT. ANN. § 3B:8-1; 20 PA. CONS. STAT. ANN. § 2203(a).

¹¹³See *supra* text accompanying notes 87–88 (describing implications of including deceased spouse's separate property in augmented estates).

¹¹⁴See *supra* text accompanying notes 105–06 (describing implications of surviving spouse keeping title to property accumulated from her own wages during marriage).

¹¹⁵See *supra* text accompanying notes 102, 107 (describing instances in which property from deceased spouse's wages can be excluded from partially augmented estate).

of the property accumulated from wages during marriage in all nine of the states.

In New York, Virginia, and North Carolina, the situation can be even more inequitable than in the other six states because a surviving spouse receives less if the deceased spouse left children, even though the surviving spouse may have raised and cared for those children and may even continue to do so after the deceased spouse's death. The elective share laws in these states could be explained by a desire to give testators the flexibility to pass on property to their children. However, nothing requires the deceased spouse to devise the extra property to his children. The deceased spouse is free to disinherit his children,¹¹⁶ and the surviving spouse's elective share will be reduced even if the deceased spouse has in fact disinherited the children. Therefore, no part of the laws guarantees that the reduction in the spousal share will accrue to the benefit of the deceased spouse's children. These laws thus appear to penalize the surviving spouse for having children with the deceased spouse, or for marrying the spouse even though he had children from other relationships, without a clear rationale for that penalty. Conversely, the laws could be seen as rewarding the deceased spouse for having children by giving him a greater degree of testamentary freedom.¹¹⁷ The other possible explanation for giving the surviving spouse less when the deceased spouse leaves children is far from the partnership theory: the surviving spouse needs less support from the deceased spouse's estate because the surviving spouse will likely receive support from the deceased spouse's children.¹¹⁸

In sum, in many situations, the elective share laws in these nine states do not ensure an equal sharing of the property accumulated from wages during a marriage. As such, these laws are even farther from embracing the partnership theory of marriage than the laws in the ten states previously discussed. The laws employing a partially augmented estate seem, on balance, to be more about ensuring that the surviving spouse has some means of support after the

¹¹⁶See *supra* note 62 (discussing fact that all states permit parents to disinherit their children except in certain limited circumstances).

¹¹⁷In this respect, the laws could be seen as contributing to repronormativity. For general discussions of repronormativity, see Katherine T. Franke, *Theorizing Yes, An Essay on Feminism, Law, & Desire*, 101 COLUM. L. REV. 181, 183–97 (2001); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1059–62 (1992); Diana Tietjens Meyers, *The Rush to Motherhood—Pronatalist Discourse & Women's Autonomy*, 26 SIGNS 735, 758–62 (2001). Cf. Sasha Roseneil, *Why We Should Care About Friends: An Argument for Queering the Care Imaginary in Social Policy*, 3 SOC. POL'Y & SOC'Y 409, 411 (2004) (calling for scholarship that “avoid[s] a ‘life-course mindset’ which focuses on generational reproduction within heterosexual family as the significant, productive activity and space, at which analytical attention should be directed”). For other examples of potentially repronormative inheritance laws, see *infra* text accompanying notes 134–36.

¹¹⁸However, because the children are not guaranteed a portion of the deceased spouse's estate, nothing guarantees that the children will have the means to support the surviving spouse, let alone the desire. See *supra* note 62 (discussing children's lack of entitlement to estates).

deceased spouse's death than they are about distributing the accumulations of a marital partnership.

3. *Nonaugmented Estates: Primarily Support*

The remaining twenty-one separate property states do not employ a definition of augmented estate or partially augmented estate when calculating the surviving spouse's elective share. Rather, the share is taken primarily from the traditional probate estate, meaning property titled in the deceased spouse's name that is subject to the probate process.¹¹⁹ The elective share laws in these states thus do not award a surviving spouse a percentage of the deceased spouse's nonprobate property even if that property was accumulated from wages during marriage,¹²⁰ nor do the laws take into account property acquired from wages during the course of the marriage but titled in the surviving spouse's name.¹²¹ In most instances, therefore, the surviving spouse's elective share will not be taken from all of the property accumulated from wages during the marriage, or even close to it. As such, the elective share laws in these states fail to embrace the partnership theory of marriage.

In addition, twenty of these twenty-one states give the surviving spouse less than one-half of the nonaugmented estate in many, if not all, situations. In Oklahoma, the surviving spouse may elect one-half of the deceased spouse's probate property that was acquired "by the joint industry of the spouses" during the marriage.¹²² The elective share in Michigan can be one-half or more of the nonaugmented estate, but the share is reduced by nonprobate transfers from the deceased spouse to the surviving spouse, apparently in an attempt to prevent overcompensation.¹²³ In seven other states, the elective share is one-

¹¹⁹There are some relatively minor deviations from the traditional probate estate definition. Most significantly, two of the twenty-one states include nonprobate transfers to the surviving spouse, apparently to prevent overcompensation, as discussed *supra* text accompanying notes 105–06. See MD. CODE ANN., EST. & TRUSTS § 3-203 (LexisNexis 2001); MO. REV. STAT. § 474.163 (2003). In addition, five of the twenty-one states take into account certain property not titled in the deceased spouse's name at the time of death if the surviving spouse did not relinquish dower-like rights to that property prior to the transfer. See ARK. CODE ANN. §§ 28-11-301 (2004); IOWA CODE § 633.238 (2003); KY. REV. STAT. ANN. §§ 392.020, 392.080 (West 1999); MICH. COMP. LAWS § 700.2202 (2002 & Supp. 2004); OHIO REV. CODE ANN. § 2103.02 (LexisNexis 2004). Finally, Oklahoma excludes the deceased spouse's separate property. See OKLA. STAT. tit. 84, § 44(B) (1990 & Supp. 2005).

¹²⁰This problem is similar to the problem discussed *supra* text accompanying notes 102 and 107, but the problem is more severe because none of the deceased spouse's nonprobate property is subject to the elective share.

¹²¹This problem is similar to the problem discussed *supra* text accompanying notes 105–06.

¹²²OKLA. STAT. tit. 84, § 44(B) (1990 & Supp. 2005).

¹²³See MICH. COMP. LAWS § 700.2202 (2)(b) (giving surviving spouse one-half of what spouse would have received had deceased spouse died without will, reduced by one-half of value of all property "derived by the spouse from decedent by any means other than testate or intestate succession upon decedent's death"). However, the surviving spouse can still be

third or less of the nonaugmented estate.¹²⁴ One additional state, Tennessee, follows a graduated approach based on the length of the marriage,¹²⁵ much like some of the augmented estate states described above.¹²⁶ Tennessee's graduated approach, however, guarantees the surviving spouse only a maximum of forty percent of the nonaugmented estate, and only after nine years of marriage.¹²⁷

In the remaining eleven states, the percentage of the nonaugmented estate awarded to the surviving spouse varies depending on whether the deceased spouse left a child or children. Four of the eleven states are like New York and Virginia in this respect,¹²⁸ permitting the surviving spouse to take one-half of the nonaugmented estate if the deceased spouse left no children but only one-third or less of the nonaugmented estate if the deceased spouse left children.¹²⁹ Two other states tie the amount of the share to the number of children left by the deceased spouse, similar to the elective share law in North Carolina.¹³⁰ Once again, however, none of these states requires the deceased spouse to give

undercompensated because the nonaugmented estate fails to include the deceased spouse's other nonprobate transfers. For a discussion of what a surviving spouse receives in Michigan if her spouse dies without a will, see *infra* text accompanying note 181.

¹²⁴See ALA. CODE § 43-8-70 (1991 & Supp. 2003) (giving surviving spouse lesser of one-third of nonaugmented estate or "[a]ll of the estate . . . reduced by the value of the surviving spouse's separate estate," defined as including nonprobate property received from deceased spouse at death); CONN. GEN. STAT. § 45a-436(a) (2004) (giving surviving spouse one-third life estate in all property passing under will); IOWA CODE § 633.238 (2003) (giving surviving spouse one-third in fee simple); KY. REV. STAT. ANN. § 392.080 (West 1999) (giving surviving spouse one-third in fee simple); OR. REV. STAT. § 114.105(1) (1989) (giving surviving spouse one-fourth of deceased spouse's net estate reduced by any nonprobate transfers to surviving spouse); R.I. GEN. LAWS § 33-25-2 (1995 & Supp. 2003) (giving surviving spouse life estate in all real property passing under will); S.C. CODE ANN. § 62-2-201(A) (1987 & Supp. 2003) (giving surviving spouse one-third in fee simple). Of particular note is that the elective shares in Connecticut and Rhode Island are limited to a life estate. See CONN. GEN. STAT. § 45a-436(a); R.I. GEN. LAWS § 33-25-2.

¹²⁵See TENN. CODE ANN. § 31-4-101(a)(1) (2001 & Supp. 2003).

¹²⁶See *supra* text accompanying notes 90-91 (discussing augmented estate rules).

¹²⁷See TENN. CODE ANN. § 31-4-101(a)(1).

¹²⁸See *supra* text accompanying note 110 (discussing variable share based on whether deceased spouse left children).

¹²⁹See ARK. CODE ANN. §§ 28-11-301, -11-305, -11-403, -39-401 (2004) (reducing share from one-half of nonaugmented estate in fee simple to, in most situations, one-third of estate's personal property in fee simple and life-estate in one-third of estate's real property); 755 ILL. COMP. STAT. 5/2-8 (2002 & Supp. 2003) (reducing share from one-half of nonaugmented estate to one-third of nonaugmented estate); MD. CODE ANN., EST. & TRUSTS § 3-203(b) (LexisNexis 2001 & Supp. 2003) (reducing share from one-half to one-third); MO. REV. STAT. § 474.160 (2000) (reducing share from one-half to one-third).

¹³⁰See MISS. CODE ANN. § 91-5-25 (1999) (reducing share from one-half of nonaugmented estate to roughly one-third or less of nonaugmented estate if deceased spouse left more than one child); OHIO REV. CODE ANN. § 2106.01(C) (LexisNexis 1994 & Supp. 2004) (reducing share from one-half of nonaugmented estate to one-third of nonaugmented estate when deceased spouse left more than one surviving child).

his children the part of the estate not going to the surviving spouse.¹³¹ Accordingly, the rationale for reducing the elective share remains unclear.

Three other states alter the amount of the share depending both on whether the deceased spouse left children and whether the surviving spouse is the other parent, by biology or adoption,¹³² of those children.¹³³ If the surviving spouse is not the other parent of the children, then the surviving spouse receives a reduced share. Therefore, in contrast to the states described above,¹³⁴ the elective share laws in these three states have the effect of penalizing surviving spouses for failing to have children with the deceased spouse. Given that wives are more likely to outlive their husbands and be surviving spouses, the three states could be attempting to provide wives with a financial incentive to have marital children, but it is highly unlikely that such laws play any role in couples' childbearing decisions. It is more likely that these three states' elective share laws reflect a conception of the typical marriage as one with marital children.¹³⁵ Therefore, these laws contribute to and reflect the repronormativity that operates throughout society.¹³⁶ This general social pressure to bear children makes financial incentives to bear children unnecessary.

¹³¹See *supra* note 62 (discussing fact that all states permit parents to disinherit their children except in certain limited circumstances).

¹³²As such, status once again trumps function. Stepparents are not considered to be parents even if they function as parents. See *supra* text accompanying note 65 (discussing privileging of status over function in inheritance law).

¹³³See IND. CODE § 29-1-3-1(a) (2000 & Supp. 2003) (reducing share from one-half of deceased spouse's nonaugmented estate to one-third of deceased spouse's personal property and one-fourth of deceased spouse's real property if surviving spouse was second or other subsequent spouse of deceased spouse and did not have children with deceased spouse *and* deceased spouse left children from previous partner); VT. STAT. ANN. tit. 14, §§ 401, 402, 461 (2002) (giving surviving spouse one-half of deceased spouse's real property if deceased spouse left only one child and child is also child of surviving spouse; if deceased spouse's child is not surviving spouse's child, or deceased spouse left more than one child or no children, surviving spouse takes only one-third of deceased spouse's real property); WYO. STAT. ANN. § 2-5-101(a) (2005) (giving surviving spouse one-half of deceased spouse's nonaugmented estate if deceased spouse left no surviving children or if surviving spouse is other parent of any of deceased spouse's surviving children; if surviving spouse is not other parent of any of deceased spouse's surviving children, giving surviving spouse only one-fourth of deceased spouse's estate).

¹³⁴See *supra* text accompanying notes 116–17 (discussing states that penalize surviving spouse where deceased spouse had children).

¹³⁵In addition, the reduction in the surviving spouse's share could be an attempt to give testators sufficient flexibility to provide for their children at death. This could be particularly important for testators in second or other subsequent marriages who want to provide for their children from previous relationships. However, because testators are not required to pass on property to their children, the reduction does not necessarily achieve this purpose. The surviving spouse is, therefore, penalized even if the testator disinherits his children. See *supra* text accompanying notes 116–117 (discussing states that penalize surviving spouse where deceased spouse had children, even if deceased spouse had disinherited those children).

¹³⁶For general discussions of repronormativity, see sources cited *supra* note 117.

The remaining two states, New Hampshire and Massachusetts, condition the amount of the elective share on whether the deceased spouse left surviving children, or if the deceased spouse did not leave children, on whether the deceased spouse left surviving parents or siblings. In both states, the surviving spouse's elective share is one-third of the deceased spouse's nonaugmented estate if the deceased spouse left children of any parentage.¹³⁷ If the deceased spouse left no children but left a parent or sibling, the surviving spouse's share is increased,¹³⁸ and if the deceased spouse left neither children nor parents or siblings, the surviving spouse's share is substantially increased.¹³⁹ These elective share laws could be explained by a desire to ensure that either the deceased spouse's children or childhood family¹⁴⁰ share the estate with the surviving spouse. However, as in the states varying the amount of the elective share depending on whether the deceased spouse left children, the deceased spouse is not required to devise the property not subject to the spousal share to his family members. Therefore, the reduction in the elective share could reflect the view that surviving spouses will need less support from a deceased spouse's estate when the surviving spouse could potentially receive future support from the deceased spouse's family. The support of in-laws, however, seems much more tenuous than any support that could be expected from children.

Each of these variations in determining the percentage of the share of the nonaugmented estate only reinforces the fact that the elective share laws in these twenty-one states consistently fail to acknowledge marriage as a partnership of equals. Not only do the laws fail to redefine property ownership at death, they also frequently fail to divide equally the property that is subject to the elective share.

As in the context of the partially augmented estate, not all surviving spouses will be materially harmed by this failure to embrace the partnership

¹³⁷See MASS. GEN. LAWS ch. 191, § 15 (2005); N.H. REV. STAT. ANN. § 560:10 (1997). In Massachusetts, however, the surviving spouse's share is capped at \$25,000, meaning that the elective share law falls far short of implementing the partnership theory of marriage in most instances. See MASS. GEN. LAWS ch. 191, § 15.

¹³⁸See MASS. GEN. LAWS ch. 191, § 15 (giving surviving spouse first \$25,000 plus income for life of one-half of remaining estate); N.H. REV. STAT. ANN. § 560:10 (1997) (giving surviving spouse first \$10,000 of deceased spouse's personal property, first \$10,000 of deceased spouse's real property, and one-half of remaining estate, but limiting surviving spouse's rights in deceased spouse's real property to a life estate).

¹³⁹See MASS. GEN. LAWS ch. 191, § 15 (giving surviving spouse first \$25,000 plus one-half of remaining property absolutely); N.H. REV. STAT. ANN. § 560:10 (giving surviving spouse lump sum consisting of first \$10,000 of each of deceased spouse's real and personal property plus additional \$2000 for each full year that spouses were married and then one-half of balance of estate, but limiting surviving spouse's rights in deceased spouse's real property to a life estate).

¹⁴⁰The term "childhood family" is used here to refer to the parents that gave birth to the deceased spouse, or adopted the deceased spouse, as well as any biological or adoptive siblings of the deceased spouse. See *supra* text accompanying note 65 (discussing how inheritance law privileges status over function).

theory of marriage. First, if the surviving spouse accumulated property titled in her individual name during the marriage, the surviving spouse may receive at her spouse's death the same amount of property she would have received upon divorce pursuant to the partnership theory, or even more. This is because, at death, the surviving spouse keeps all of the property titled in her name plus the percentage of the property titled in the deceased spouse's name awarded under the elective share.¹⁴¹ In contrast, at divorce, the spouses would equally divide the property accumulated from both of their wages during marriage, regardless of who holds title. Thus, even though the surviving spouse may receive less than half of the deceased spouse's nonaugmented estate under the elective share, she may make up the difference, and even exceed it, with the property titled in her name.

Second, if the deceased spouse died with significant separate property that was subject to probate, and hence subject to the elective share pursuant to the elective share laws in the twenty-one states, the surviving spouse will be entitled to a percentage of that property even though it was not accumulated from wages during marriage. Because the surviving spouse would be entitled to none of this separate property at divorce, she can receive more property upon the deceased spouse's death than she would upon divorce.¹⁴²

Surviving spouses in other situations, however, will likely be materially harmed from these states' failure to embrace the partnership theory. If the surviving spouse does not have marital assets titled in her own name, she will likely receive much less under these elective share laws than she would have received upon divorce unless the deceased spouse died with sufficient separate property that was subject to probate. In the absence of sufficient separate property, the surviving spouse without marital assets titled in her own name will be materially harmed by staying in the marriage "until death do us part."

In any event, material gain or loss is not the appropriate measure for whether an elective share law embraces the partnership theory of marriage. Rather, the appropriate inquiry is whether the law promotes equal sharing of the assets accumulated from wages during marriage, thereby recognizing

¹⁴¹Elective share laws that employ augmented estates, in contrast, prevent this outcome. As set forth *supra* notes 82–83 and accompanying text, augmented estates attempt to serve two functions: first, to implement the partnership theory of marriage; and second, to prevent the overcompensation of surviving spouses who had marital assets titled in their own names. In contrast, states that employ partially augmented estates, like those states that employ nonaugmented estates, often fail to meet this goal. *See supra* text accompanying notes 105–106 (discussing failure of states employing partially augmented estates to prevent some overcompensation of surviving spouses).

¹⁴²*See supra* text accompanying notes 87–88, 104 (discussing similar problem in states that employ augmented estates and partially augmented estates). The exception would be in Oklahoma, where the elective share is taken from only that probate property that was acquired "by the joint industry of the spouses" during the marriage. OKLA. STAT. tit. 84, § 44(B) (1990 & Supp. 2005).

marriage as a partnership experienced by two equal individuals.¹⁴³ The laws in these twenty-one states fall far short of meeting this standard, suggesting that the laws are still primarily motivated by the support rationale that was at the core of traditional elective share laws.

C. Overall Comparison to Divorce

In sum, the elective share laws that come closest to reflecting the partnership theory of marriage that underlies property division in the context of divorce are those, found in ten states, that give a surviving spouse a percentage of the deceased spouse's augmented estate.¹⁴⁴ However, these elective share laws do not precisely replicate the concepts of marital property or community property that lie at the core of the partnership theory. Spouses in these ten states therefore can receive different amounts of property under the states' default rules when their marriages end by death than they would have received upon divorce.

In the other thirty-one separate property states, such a divergence between property distribution at death and divorce is even more likely. In twenty-one states, the elective share is taken from a nonaugmented estate, which in most cases will not reflect the assets accumulated from wages during marriage because it is limited to property titled in the deceased spouse's name that is subject to the probate process.¹⁴⁵ In an additional nine states, the share is taken from a partially augmented estate, which falls between the nonaugmented and augmented estates,¹⁴⁶ but surviving spouses receive less than half of that partially augmented estate in all but one of the nine states.¹⁴⁷ Accordingly, even in situations where the partially augmented estate comes close to replicating the concept of marital property or community property, surviving spouses are not guaranteed the same amount of property upon their spouse's death as they would have likely received upon divorce.

As such, although Georgia is the only separate property state that respects a married individual's decision to disinherit his spouse (beyond a year of support),¹⁴⁸ the default rules that prevent disinheritance in the other forty separate property states do not completely embrace a partnership theory of

¹⁴³For discussion of the components of the partnership theory, see *supra* text accompanying notes 53–60.

¹⁴⁴As discussed *supra* text accompanying notes 78–92, these ten states are Alaska, Colorado, Hawaii, Kansas, Minnesota, Montana, North Dakota, South Dakota, Utah, and West Virginia.

¹⁴⁵As discussed *supra* text accompanying notes 119–140, these states are Alabama, Arkansas, Connecticut, Kentucky, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, and Wyoming.

¹⁴⁶As discussed *supra* text accompanying notes 100–112, these states are Delaware, Florida, Maine, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, and Virginia.

¹⁴⁷See *supra* text accompanying note 109 (discussing Nebraska as exception).

¹⁴⁸See *supra* text accompanying notes 72–74 (discussing Georgia's inheritance law).

marriage. Rather, the elective share laws in these states reflect conceptions of marriage that, at least in part, view spouses not as equals, but as dependents entitled to support.

III. WHEN A SPOUSE DIES WITHOUT A WILL

As discussed in Part II, every state permits individuals to execute wills that govern the distribution of their property at death subject to the restrictions of the elective share laws. If an individual fails to execute a valid will prior to death, states provide default distributions as set forth in their intestacy laws.¹⁴⁹ In every state, these intestacy laws distribute the deceased individual's property to various family members, including the surviving spouse if the individual was legally married at the time of death.¹⁵⁰ Although intestacy laws generally provide a surviving spouse with at least one-half of the deceased spouse's estate, and thus could be seen as similar to the distribution of marital property upon divorce, most of these laws fail to reflect a partnership theory of marriage.

In the community property states, the surviving spouse retains her half of the community property at the deceased spouse's death whether the deceased spouse died with or without a will. The intestacy laws in the community property states are therefore consistent with the partnership theory of marriage because they guarantee that surviving spouses receive at least half of the assets accumulated from wages during marriage. However, the intestacy laws in eight of the nine community property states also give surviving spouses additional property, namely a share of the deceased spouse's half of the community property and a share of the deceased spouse's separate property.¹⁵¹ Therefore, in most of the community property states, the surviving spouse is better off financially if her spouse dies intestate than she likely would have been upon divorce.

Similarly, in many separate property states, the surviving spouse is given one-half or more of the deceased spouse's estate.¹⁵² This does not mean that the intestacy laws reflect a partnership theory of marriage, however. None of the separate property states embrace a concept of marital property at

¹⁴⁹In most instances, the governing intestacy law is that of the state where the deceased spouse lived at the time of his death. *DUKEMINIER & JOHANSON, supra* note 19, at 72. However, if the deceased spouse owned any real property outside of that state, the intestacy laws of the situs of the property would control the distribution of that property. *Id.*

¹⁵⁰Once again, the surviving spouse is entitled to inherit only if she enjoys the legal status of spouse or, in California, Hawaii, Maine, New Hampshire, and Vermont, qualifies as a recognized partner under the state's inheritance law. *See supra* text accompanying notes 64–65 (discussing exclusivity of spousal entitlement).

¹⁵¹These eight states are Arizona, California, Idaho, Nevada, New Mexico, Texas, Washington, and Wisconsin. *See infra* notes 166, 178–80 (listing, *inter alia*, community property states giving surviving spouses additional property).

¹⁵²*See infra* text accompanying notes 165–68, 178, 180–81, 191–99 (explaining various intestate distributions in which surviving spouse receives more than one-half of estate).

intestacy.¹⁵³ Instead, the property subject to intestate distribution consists solely of probate property titled in the deceased spouse's name, whether that property would be considered separate property or property accumulated from wages during marriage.¹⁵⁴ Unlike the elective share laws, none of the separate property states' intestacy laws employs a concept of an augmented estate to broaden the definition of estate.¹⁵⁵ Excluded from the deceased spouse's intestate estate are both property titled in the surviving spouse's name and nonprobate property,¹⁵⁶ meaning that the estate is often far from a reflection of the assets accumulated from wages during marriage.

Therefore, although most separate property states give the surviving spouse one-half or more of the deceased spouse's estate at intestacy, these states' intestacy laws do not reflect the partnership theory of marriage.¹⁵⁷ In addition, intestacy laws are supposed to reflect the probable intent of the average decedent,¹⁵⁸ and most married individuals indicate that they would like all of their estates to go to their spouse should they die without a will.¹⁵⁹ This preference could be seen as the ultimate expression of the partnership theory of marriage because it is consistent with the property distributions that occur when other types of partnerships, such as joint tenancies¹⁶⁰ or some business partnerships,¹⁶¹ are dissolved by death. In none of the fifty states, however, does the surviving spouse consistently receive the entirety of the deceased spouse's estate in the absence of a will. Instead, as set forth below, if the deceased spouse left children or, in some cases, parents or siblings, the surviving spouse must split the deceased spouse's estate with those parties.

¹⁵³For a definition of marital property, see *supra* text accompanying note 30.

¹⁵⁴Hence, intestate shares are taken from the traditional probate estate. See *supra* text accompanying notes 76–77 (discussing property excluded from traditional probate estate).

¹⁵⁵See *supra* text accompany notes 78–86, 98–107 (listing states that employ concepts of augmented estate and partially augmented estate for purposes of elective share).

¹⁵⁶The exact nature of property that is not subject to probate varies from state to state, but generally includes joint tenancies, payment-on-death accounts, life insurance, inter vivos gifts made prior to death, and trusts. DUKEMINIER & JOHANSON, *supra* note 19, at 34–35.

¹⁵⁷As discussed *supra* text accompanying notes 141–143, material gain is not an appropriate proxy for whether a law embraces the partnership theory of marriage. Rather, the appropriate inquiry is whether the law promotes equal sharing of the assets accumulated from wages during marriage.

¹⁵⁸DUKEMINIER & JOHANSON, *supra* note 19, at 74.

¹⁵⁹Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 348–68, 385–87; Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 704–05 (1992).

¹⁶⁰See DUKEMINIER & JOHANSON, *supra* note 19, at 350–51.

¹⁶¹See SUGARMAN, *supra* note 33, at 139.

A. Spouses with Children

In every state, how a deceased spouse's estate is distributed under the state's intestacy law depends on whether the deceased spouse left children¹⁶² and, in over half of the states,¹⁶³ whether the surviving spouse is the other biological or adoptive parent of those children.¹⁶⁴ As such, in contrast to the elective share laws, which give testators the right to give large portions of their estate to parties other than their spouses but do not require that those other parties include the deceased spouse's children, these laws often mandate that a deceased spouse's estate be divided between the surviving spouse and the deceased spouse's children.

1. Taking the Entire Estate

If the deceased spouse left children, the surviving spouse takes the deceased spouse's entire estate in sixteen states,¹⁶⁵ but only if certain conditions are met. First, in nine of the sixteen states, the surviving spouse receives the entire estate only if the surviving spouse is the other parent of the deceased spouse's children.¹⁶⁶ If the surviving spouse is not the other parent, but rather is a stepparent, then the surviving spouse must share the estate with the deceased spouse's children.¹⁶⁷ Second, in seven of the sixteen states, an extra condition is imposed: the surviving spouse receives the entire estate only if the surviving spouse is the other parent of the deceased spouse's children *and* the surviving spouse does not have living children from other

¹⁶²As in Part II, the term "children" will be used to refer to living children and descendants of deceased children.

¹⁶³Specifically, this applies in thirty states: Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. *See infra* notes 166, 178, 181, 184, 186 (citing intestacy statutes from these states). The other twenty states do not make this distinction, but rather focus solely on whether the deceased spouse left children, without regard to the identity of the other parent of those children.

¹⁶⁴Because of the emphasis on status over function in inheritance law, stepparents are not considered parents under most intestacy laws. *See supra* text accompanying notes 64–65 for a discussion of status over function in inheritance law.

¹⁶⁵These sixteen states are Alaska, Arizona, Colorado, Hawaii, Iowa, Minnesota, Montana, North Dakota, Ohio, Oregon, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. *See infra* notes 166–67 (citing intestacy statutes from these states).

¹⁶⁶*See* ARIZ. REV. STAT. ANN. § 14-2102 (1995 & Supp. 2003); IOWA CODE § 633.211 (2003); OHIO REV. CODE ANN. § 2105.06 (LexisNexis 2004); OR. REV. STAT. § 112.025 (1989); S.D. CODIFIED LAWS § 29A-2-102 (1997); TEX. PROB. CODE ANN. § 45(a)(2) (Vernon 2003 & Supp. 2004); UTAH CODE ANN. § 75-2-102 (1993 & Supp. 2003); VA. CODE ANN. § 64.1-1 (2002 & Supp. 2003); WIS. STAT. § 852.01 (2002).

¹⁶⁷*See supra* note 166 for supportive statutory citations.

relationships.¹⁶⁸ If the surviving spouse in these seven states does have living children who are not also children of the deceased spouse, then the surviving spouse does not receive the entire estate, but rather must share it with the deceased spouse's children.¹⁶⁹

Giving the surviving spouse the deceased spouse's entire estate in these situations appears to respect the view shared by the majority of married individuals that the surviving spouse should receive the entire estate when a spouse dies without a will.¹⁷⁰ But this majority view is respected only up to a point. The limitations on when a surviving spouse receives the entire estate necessarily reflect something other than the presumed intent of the average spouse. Given that the limitations are tied to the deceased spouse's children, commentators have surmised that the intestacy laws in these sixteen states reflect a policy of ensuring that the deceased spouse's children are remembered when the deceased spouse's estate is distributed.¹⁷¹

By giving the surviving spouse the entire estate when she is the other parent of the deceased spouse's children, these laws reflect a "conduit theory,"¹⁷² whereby the surviving spouse is assumed to take the needs of the deceased spouse's children into account if those children are also the surviving spouse's children.¹⁷³ Conversely, by giving the surviving spouse less than the entire estate in situations where the surviving spouse is not the other parent of the deceased spouse's children, the laws suggest that a surviving spouse cannot be assumed to address the needs of stepchildren.¹⁷⁴ Similarly, the laws in seven of the states¹⁷⁵ suggest that surviving spouses cannot be assumed to adequately address the needs of the deceased spouse's children, even when they are also

¹⁶⁸See ALASKA STAT. § 13.12.102 (2002); COLO. REV. STAT. § 15-11-102 (2005); HAW. REV. STAT. § 560:2-102 (1993); MINN. STAT. § 524.2-102 (2002); MONT. CODE ANN. § 72-2-112 (2003); N.D. CENT. CODE § 30.1-04-02 (1996); W.VA. CODE § 42-1-3 (1997 & Supp. 2003). These seven states have adopted the UPC's model intestacy scheme. See UNIF. PROBATE CODE § 2-102 (amended 1993).

¹⁶⁹See *supra* note 168 for supportive statutory citations.

¹⁷⁰See *supra* note 159 (listing studies revealing that most spouses would prefer surviving spouse to take their entire intestate estate).

¹⁷¹See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.2 reporter's note (1999) [hereinafter DONATIVE TRANSFERS]; UNIF. PROBATE CODE § 2-102 cmt.

¹⁷²See DONATIVE TRANSFERS, *supra* note 171, at § 2.2 reporter's note (introducing conduit theory and discussing some potential complications); Waggoner, *supra* note 159, at 707-08 (explaining and critiquing conduit theory).

¹⁷³The surviving spouse could take these needs into account either by making inter vivos gifts to the children or by leaving the children money at the surviving spouse's death by will or through intestacy.

¹⁷⁴This would be particularly true if the surviving spouse subsequently died without a will because the states limit intestate distribution to biological or adopted children. Stepchildren, therefore, do not take under the intestacy laws. For one example of the assumption that stepparents will not otherwise address the needs of their stepchildren, see UNIF. PROBATE CODE § 2-102, with its focus on "natural objects of the bounty of the surviving spouse." UNIF. PROBATE CODE § 2-102.

¹⁷⁵See *supra* note 168 (citing seven states that have adopted UPC's model intestacy scheme).

the surviving spouse's children, if the surviving spouse has other children who may siphon off some support that would otherwise go to the deceased spouse's children.¹⁷⁶ Indeed, the drafters of the UPC gave these very reasons when they proposed the intestacy scheme later adopted by the seven states.¹⁷⁷

In addition to addressing the potential needs of the deceased spouse's children, however, these limitations have the effect of penalizing surviving spouses who married spouses with children from other partners, and, in the seven states, also penalizing surviving spouses who had children with other partners before marrying the deceased spouse. By giving the surviving spouse the entire estate only when all of the deceased spouse's children and, in the seven states, all of the surviving spouse's children, are products of the relationship between the deceased spouse and the surviving spouse, the intestacy laws in the sixteen states could be viewed as reflecting a preference for first marriages, as opposed to second or other subsequent marriages, or at the very least, a preference for marriages with marital children only (and no stepchildren). The surviving spouse is given the entire estate when one of these preferred marriages ends, but is given less than the entire estate when her marriage did not conform to the ideal of a marital union with children borne solely of that union.

2. *Splitting the Estate with Children*

In no other situation where the deceased spouse left children does the surviving spouse receive the deceased spouse's entire intestate estate. Rather, the surviving spouse must share the estate with the deceased spouse's children. In eleven of the sixteen states described above, the surviving spouse in this situation almost always receives more than she would have likely received upon divorce.¹⁷⁸ In the remaining five states, the surviving spouse receives half

¹⁷⁶UNIF. PROBATE CODE § 2-102 cmt.

¹⁷⁷Waggoner, *supra* note 79, at 229-35.

¹⁷⁸In two of the eleven states, both of which are community property states, the surviving spouse receives more than just the half of the community property that she would have received upon divorce, because the surviving spouse also receives one-half of the deceased spouse's separate property. *See* ARIZ. REV. STAT. ANN. § 14-2102 (1995); WIS. STAT. § 852.01 (2002). In the other nine states, the surviving spouse first takes an initial lump sum, or a similar amount, and then one-half of the balance of the estate, with the children taking the rest. In six of these states, the initial lump sum is \$100,000 if the deceased spouse has children who are not children of the surviving spouse and \$150,000 if the surviving spouse is the other parent of all of the deceased spouse's children but the surviving spouse has children from other relationships. *See* ALASKA STAT. § 13.12.102 (2002); COLO. REV. STAT. § 15-11-102 (2005); HAW. REV. STAT. § 560:2-102 (2003); MINN. STAT. § 524.2-102 (2002); MONT. CODE ANN. § 72-2-112 (2003); N.D. CENT. CODE § 30.1-04-02 (1996). In Colorado, however, amounts are reduced to one-half of the deceased spouse's estate if the deceased spouse left minor children. *See* COLO. REV. STAT. § 15-11-102. In the other three states, the lump sum is contingent only on the deceased spouse leaving children who are not children of the surviving spouse. *See* IOWA CODE § 633.212 (2003) (giving surviving spouse all personal property that "was in the hands of the decedent as the head of a family," plus one-half of deceased spouse's other personal property, one-half of deceased

of the deceased spouse's estate, or less.¹⁷⁹ As such, in these five states the penalty for marrying someone with children from other relationships is rather severe: instead of receiving the deceased spouse's entire estate, or a substantial portion of the estate, the surviving spouse is left with an amount that could be similar to, or less than, what she would have likely received upon divorce.

In the other thirty-four states, the surviving spouse never receives the deceased spouse's entire estate in any situation where the deceased spouse left children, even if the surviving spouse is the other parent of those children. Thus, in contrast to the sixteen states discussed above, the laws of these states appear to assume that the surviving spouse will never adequately address the needs of the deceased spouse's children, even if those children are also children of the surviving spouse.

The most a surviving spouse in these thirty-four states can receive when a deceased spouse leaves children is a lump sum plus half of the balance of the deceased spouse's estate, available in six of the thirty-four states in all situations where the deceased spouse leaves children,¹⁸⁰ and in another eleven

spouse's real property, and any other remaining property necessary to make surviving spouse's share equal at least \$50,000); S.D. CODIFIED LAWS § 29A-2-102 (1997) (giving surviving spouse lump sum of \$100,000); UTAH CODE ANN. § 75-2-102 (1993 & Supp. 2003) (giving surviving spouse lump sum of \$50,000). Because these nine states are separate property states, the surviving spouse takes the entirety of estates that are equal to or smaller than the lump sum amount, but must share larger estates with the deceased spouse's children.

¹⁷⁹In three of the five states, the surviving spouse simply takes her half of the community property, or half of the deceased spouse's estate, with the remainder of the estate split between the children of the deceased spouse. *See* OR. REV. STAT. § 112.025 (2003); TEX. PROB. CODE ANN. § 45(b) (Vernon 2004); W. VA. CODE § 42-1-3(b), (c) (1997). In West Virginia, however, the share is increased to three-fifths of the deceased spouse's estate if the surviving spouse is the other parent of all of the deceased spouse's children but the surviving spouse has children from other relationships. *See* W. VA. CODE § 42-1-3. In the last two states, the surviving spouse either takes less than half of the deceased spouse's estate, or takes more than half or less than half depending on the number of children left by the deceased spouse. *See* OHIO REV. CODE ANN. § 2105.06 (LexisNexis 2004) (giving surviving spouse first \$20,000 plus one-half of balance of intestate estate if deceased spouse leaves one surviving child or lineal descendants of that child, and surviving spouse is not other parent of that child; giving surviving spouse first \$60,000 plus one-third of estate if deceased spouse leaves more than one surviving child or their lineal descendants, and surviving spouse is other parent of one, but not all, of those children; giving surviving spouse first \$20,000 plus one-third of estate if deceased spouse leaves more than one surviving child or their lineal descendants, and surviving spouse is other parent of none of those children); VA. CODE ANN. §§ 64.1-1, 11 (2003) (giving surviving spouse one-third of both personal and real property).

¹⁸⁰In California, Idaho, Nevada, New Mexico, and Washington, the lump sum is comprised of the deceased spouse's half of the community property, which means that the surviving spouse receives the entirety of the couple's community property. *See* CAL. PROB. CODE § 6401 (West 2004); IDAHO CODE ANN. § 15-2-102 (2001); NEV. REV. STAT. § 134.040 (2003); N.M. STAT. § 45-2-102 (1995); WASH. REV. CODE § 11.04.015 (2004). In New York, the lump sum amount is \$50,000. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 1998). In New Mexico, the surviving spouse receives one-quarter of the balance of the deceased spouse's estate. *See* N.M. STAT. § 45-2-102 (1995). In the other five states, the surviving spouse receives one-half of the

states when the surviving spouse is the other parent of the deceased spouse's children.¹⁸¹ In another six states, the surviving spouse receives one-half of the deceased spouse's estate whenever the deceased spouse leaves children, regardless of parentage.¹⁸² In the remaining eleven states, the share is either less than one-half of the intestate estate¹⁸³ or can become less than one-half of the intestate estate, either because the share is tied to the parentage¹⁸⁴ or the number of children left by the deceased spouse,¹⁸⁵ or because the surviving

balance. See CAL. PROB. CODE § 6401; IDAHO CODE ANN. § 15-2-102; NEV. REV. STAT. § 134.040; N.Y. EST. POWERS & TRUSTS LAW § 4-1.1; WASH. REV. CODE § 11.04.015.

¹⁸¹In these eleven states, the lump sum ranges from \$20,000 to \$150,000. See ALA. CODE § 43-8-41 (1991) (\$50,000); CONN. GEN. STAT. § 45a-437 (2004) (\$100,000); FLA. STAT. § 732.102 (2003) (\$60,000); ME. REV. STAT. ANN. tit. 18-A, § 2-102 (1997 & Supp. 2005) (\$50,000); MD. CODE ANN., EST. & TRUSTS § 3-102 (LexisNexis 2001) (\$15,000); MICH. COMP. LAWS § 700.2102 (2002) (\$150,000); MO. REV. STAT. § 474.010 (2000) (\$20,000); NEB. REV. STAT. § 30-2302 (2003) (\$50,000); N.H. REV. STAT. ANN. § 561:1 (1997) (\$50,000); N.J. STAT. ANN. § 3B:5-3 (West 1983 & Supp. 2004) (\$50,000); 20 PA. CONS. STAT. ANN. § 2102 (West 2005) (\$30,000). If the surviving spouse is not the other parent of the children in these eleven states, the surviving spouse's share is reduced, generally to one-half of the estate. The exception is Michigan, where the surviving spouse receives a reduced lump sum of \$100,000 and one-half of the balance of the estate. See MICH. COMP. LAWS § 700.2102. In addition, in Maryland, the surviving spouse's share is reduced from a lump sum plus half, to half of the estate, if the deceased spouse left a minor child, even if the surviving spouse is the other parent of that child. See MD. CODE ANN., EST. & TRUSTS § 3-102.

¹⁸²In five of the six states, the surviving spouse receives one-half of the probate estate. See 755 ILL. COMP. STAT. 5/2-1 (2002); KAN. STAT. ANN. § 59-504 (1994); MASS. GEN. LAWS ch. 190, § 1 (2004); S.C. CODE ANN. § 62-2-102 (1987 & Supp. 2004); WYO. STAT. ANN. § 2-4-101 (2001). In Louisiana, the surviving spouse simply receives her half of the community property. See LA. CIV. CODE ANN. art. 890 (2000) (giving surviving spouse half of community property and usufruct over deceased spouse's community property).

¹⁸³In two states, the intestate share is almost always less than half. See KY. REV. STAT. ANN. §§ 391.010, .030 (West 2004) (giving deceased spouse's children all of deceased spouse's real property and all of deceased spouse's personal property except for \$15,000, which is set aside for surviving spouse); VT. STAT. ANN. tit. 14 §§ 401, 461, 551 (2002) (giving surviving spouse one-third of deceased spouse's real and personal property unless surviving spouse waives right to real property and deceased spouse leaves no children, in which case surviving spouse takes first \$25,000 plus half of remainder of estate).

¹⁸⁴In two states, the one-half share is reduced if the surviving spouse is not the other parent of all of the deceased spouse's children or is not the other parent of at least one of the deceased spouse's children. See IND. CODE § 29-1-2-1 (2003) (reducing share from one-half of estate to twenty-five percent of deceased spouse's real property and one-half of deceased spouse's personal property if surviving spouse is second or subsequent spouse who never had children with deceased spouse); OKLA. STAT. tit. 84, § 213 (1990 & Supp. 2005) (reducing share from one-half of estate to child's share if surviving spouse is not other parent of all of deceased spouse's children). Indiana's intestacy law, unlike the intestacy laws in most states, actually rewards surviving spouses for having children with the deceased spouse, and thus could be viewed as contributing to repronormativity. For a general discussion of repronormativity, see Franke, *supra* note 117. See also *supra* text accompanying notes 133–136 (describing similar incentives present in Indiana's elective share law).

¹⁸⁵See GA. CODE ANN. § 53-2-1(b)(1) (1997) (dividing intestate estate equally between surviving spouse and each of deceased spouse's children, but giving surviving spouse at least one-third share); MISS. CODE ANN. § 91-1-7 (1999) (dividing estate equally between surviving

spouse is given a life estate¹⁸⁶ or partial life estate¹⁸⁷ in the deceased spouse's real property.

Accordingly, although these last thirty-four states never give the surviving spouse the entire estate when the deceased spouse leaves children, there are two similarities between some of their intestacy laws and the intestacy laws of the first sixteen states discussed above. First, thirteen of the thirty-four states, like the first sixteen states, give the surviving spouse a reduced share if she is not the other parent of the deceased spouse's children.¹⁸⁸ Therefore, a total of twenty-nine states appear to assume that surviving spouses will take some care to address the needs of the deceased spouse's children if those children are also the surviving spouse's children.¹⁸⁹ As discussed above, however, the laws in these twenty-nine states also have the effect of penalizing surviving spouses who married parents of children from other relationships.¹⁹⁰

Second, seven of the thirty-four states ensure that the surviving spouse will receive more than half of the deceased spouse's estate, and hence potentially more than the surviving spouse would have likely received upon divorce, even if the surviving spouse is only the stepparent of the deceased spouse's children.¹⁹¹ These seven states are thus like the eleven of the initial

spouse and deceased spouse's children or descendants of such children); N.C. GEN. STAT. § 29-14 (2003) (noting that if deceased spouse leaves only one surviving child or only one lineal descendant of deceased child, then surviving spouse takes one-half of deceased spouse's real property and first \$30,000 plus one-half of deceased spouse's personal property; if deceased spouse leaves more than one surviving child or one surviving child and lineal descendant of deceased child, then surviving spouse takes one-third of deceased spouse's real property and first \$30,000 plus one-third of deceased spouse's personal property); TENN. CODE ANN. § 31-2-104 (2001) (giving surviving spouse greater of one-third share or child's share of intestate estate).

¹⁸⁶See DEL. CODE ANN. tit. 12, § 502 (2001) (giving surviving spouse life estate in entirety of deceased spouse's real property and first \$50,000 of deceased spouse's personal property plus one-half of balance, if surviving spouse is other parent of deceased spouse's children, and reducing that amount to life estate in entirety of deceased spouse's real property and one-half of deceased spouse's personal property if surviving spouse is not other parent of all of deceased spouse's children).

¹⁸⁷See ARK. CODE ANN. §§ 28-9-206, -9-214, -11-301, -11-305 (2004) (giving children entire heritable estate, subject to surviving spouse's dower or curtesy rights that entitle surviving spouse to life estate in one-third of deceased spouse's real property and one-third ownership of deceased spouse's personal property); R.I. GEN. LAWS §§ 33-1-1, -5, -6, -10 (1995 & Supp. 2004) (giving surviving spouse one-half of deceased spouse's personal property and first \$75,000 of deceased spouse's real property and life estate in remainder).

¹⁸⁸These thirteen states are Alabama, Connecticut, Delaware, Florida, Indiana, Maine, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, Oklahoma, and Pennsylvania. See *supra* notes 181, 184, and 186 for supporting statutory citations.

¹⁸⁹However, the level of support assumed to be available varies. The thirteen states that never give the surviving spouse the entire estate necessarily assume that the surviving spouse will provide less support than do the other sixteen states.

¹⁹⁰See *supra* Part III.A.1 (analyzing how surviving spouse who marries partner with children from other partners can be at economic disadvantage compared to surviving spouse who marries partner without children).

¹⁹¹These seven states are California, Idaho, Michigan, Nevada, New Mexico, New York, and Washington. See *supra* notes 180–181 (listing supporting statutory citations).

sixteen states that guarantee the surviving spouse more than half of the deceased spouse's estate.¹⁹² Accordingly, a total of eighteen of the fifty states guarantee a surviving spouse more than half of the deceased spouse's estate in any situation where the deceased spouse left children.

B. Childless Spouses

If the deceased spouse does not leave a will and does not leave any children or surviving descendants of deceased children, states follow one of three general approaches for dividing the deceased spouse's estate.

1. Taking the Entire Estate

First, twenty-two states simply give the entire intestate estate to the surviving spouse.¹⁹³ These twenty-two states include eleven of the sixteen states that also give the surviving spouse the entire estate in situations where the deceased spouse left children and the surviving spouse is the other parent of those children.¹⁹⁴ Therefore, in these eleven states, the intestacy laws appear to be neutral with respect to whether the married couple had children together: the surviving spouse receives the entire estate whether or not she had children with the deceased spouse. The surviving spouse receives less than the entire estate only when the deceased spouse left children who were not also children of the surviving spouse.¹⁹⁵ The surviving spouse is thus given the entire estate except in situations in which the law presumes that the surviving spouse will not adequately remember the children of the deceased spouse because the surviving spouse is not the other parent of those children.¹⁹⁶

¹⁹²These eleven states are Alaska, Arizona, Colorado, Hawaii, Iowa, Minnesota, Montana, North Dakota, South Dakota, Utah, and Wisconsin. *See supra* note 178 (listing supporting statutory citations).

¹⁹³*See* ARIZ. REV. STAT. ANN. § 14-2102 (Supp. 2003); FLA. STAT. § 732.102 (2003); GA. CODE ANN. § 53-2-1(b)(1) (1997); 755 ILL. COMP. STAT. 5/2-1 (Supp. 2003); IOWA CODE § 633.211 (2003); KAN. STAT. ANN. § 59-504 (1994); MINN. STAT. § 524.2-102 (2002); MISS. CODE ANN. § 91-1-7 (1972); MO. REV. STAT. § 474.010 (2000); N.M. STAT. § 45-2-102 (1995); N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 1998); OHIO REV. CODE ANN. § 2105.06 (LexisNexis Supp. 2004); OR. REV. STAT. § 112.035 (1953); S.C. CODE ANN. § 62-2-102 (1976); S.D. CODIFIED LAWS § 29A-2-102 (1997); TENN. CODE ANN. § 31-2-104 (2001); TEX. PROB. CODE ANN. § 45(a) (Vernon 2003); UTAH CODE ANN. § 75-2-102 (Supp. 2003); VA. CODE ANN. § 64.1-1 (Supp. 2003); W. VA. CODE § 42-1-3 (1997); WIS. STAT. § 852.01 (2002); WYO. STAT. ANN. § 2-4-101 (2001).

¹⁹⁴These eleven states are Arizona, Iowa, Minnesota, Ohio, Oregon, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. *See supra* notes 166–168 (listing supporting statutory citations and distinguishing Minnesota and West Virginia as requiring another condition).

¹⁹⁵*See supra* notes 167–68 and accompanying text (listing citations and discussing consequences of surviving spouse not being parent of deceased spouse's children).

¹⁹⁶*See supra* notes 171 and 174 and accompanying text (discussing assumptions regarding surviving spouse's intent toward stepchildren).

In the other eleven of the twenty-two states, the surviving spouse receives more when the deceased spouse leaves no children than when the deceased spouse leaves children.¹⁹⁷ Because the surviving spouse in these states receives the entire estate only when the deceased spouse leaves no children, the surviving spouse benefits from marrying a childless spouse and subsequently not having children with that spouse. When the surviving spouse does have children with the deceased spouse, the law appears to assume that she will not have the ability or desire to provide adequately for the children, even though she is the other parent of those children.¹⁹⁸

2. *Splitting the Estate with Parents*

In the remaining twenty-eight states, the amount of the surviving spouse's share depends on whether the deceased spouse left any surviving parents. If the deceased spouse did leave a surviving parent, then in all twenty-eight of the states a portion of the estate goes to the deceased spouse's parent with the remainder going to the surviving spouse. The surviving spouse generally receives more than one-half of the deceased spouse's estate in these situations,¹⁹⁹ but not always.²⁰⁰ As such, the surviving spouse receives more

¹⁹⁷These eleven states are Florida, Georgia, Illinois, Kansas, Mississippi, Missouri, New Mexico, New York, South Carolina, Tennessee, and Wyoming. *See supra* notes 180–182 and 185 (listing supporting statutory citations).

¹⁹⁸*See supra* notes 172–76 and accompanying text (discussing assumptions regarding attitude of surviving spouse toward her children with deceased spouse).

¹⁹⁹In seven of the twenty-eight states, the surviving spouse receives a lump sum plus three-fourths of the balance of the deceased spouse's estate. *See* ALASKA STAT. § 13.12.102 (2002) (lump sum of \$200,000); COLO. REV. STAT. § 15-11-102 (2005) (lump sum of \$200,000); CONN. GEN. STAT. § 45a-437 (2004) (lump sum of \$100,000); HAW. REV. STAT. ANN. § 560-2-102 (LexisNexis 2005) (lump sum of \$200,000); MICH. COMP. LAWS § 700.2102 (2002) (lump sum of \$150,000); MONT. CODE ANN. § 72-2-112 (2003) (lump sum of \$200,000); N.D. CENT. CODE § 30.1-04-02 (1996) (lump sum of \$200,000). In one other state, the surviving spouse receives three-fourths of the deceased spouse's estate and no lump sum. *See* IND. CODE § 29-1-2-1 (1998). In ten of the twenty-eight states, the surviving spouse receives a lump sum plus one-half of the balance of the deceased spouse's estate. *See* ALA. CODE § 43-8-41 (1991) (lump sum of \$100,000); ME. REV. STAT. ANN. tit. 18-A, § 2-102 (1964) (lump sum of \$50,000); MD. CODE ANN., EST. & TRUSTS § 3-102 (LexisNexis 2001) (lump sum of \$15,000); MASS. GEN. LAWS ch. 190, § 1 (2004) (lump sum of \$200,000); NEB. REV. STAT. § 30-2302 (1995) (lump sum of \$50,000); N.H. REV. STAT. ANN. § 561:1 (1997 & Supp. 2003) (lump sum of \$50,000); N.J. STAT. ANN. § 3B:5-3 (West 1983) (lump sum of \$50,000); N.C. GEN. STAT. § 29-14 (2003) (lump sum of \$50,000 from personal property only); 20 PA. CONS. STAT. § 2102 (Supp. 2003) (lump sum of \$30,000); VT. STAT. ANN. tit. 14, § 551 (2002) (lump sum of \$25,000). In five of the twenty-eight states, all community property states, the surviving spouse receives, in addition to her half of the community property, the deceased spouse's half of the community property plus, in all states but Louisiana, a portion of the deceased spouse's separate property. *See* CAL. PROB. CODE § 6401(a), (b), (c)(2)(B) (West 1991 & Supp. 2005); IDAHO CODE ANN. § 15-2-102(a)(2), (b)(1) (2001); LA. CIV. CODE ANN. arts. 894, 889 (2000); NEV. REV. STAT. §§ 123.250(1), 134.050 (2003); WASH. REV. CODE § 11.04.015 (1)(a), (c) (2004).

²⁰⁰In the remaining five of the twenty-eight states, the surviving spouse either can receive or always receives less than half of the deceased spouse's estate. *See* ARK. CODE ANN. § 28-9-

than the amount she would have likely received upon divorce in all but five of the twenty-eight states.²⁰¹

The laws in these twenty-eight states could be seen as reflecting a desire to ensure that a deceased spouse's parents receive at least some support from their child during their elderly years. A surviving parent, in most instances, will be older than a surviving spouse, and thus may be in more immediate need of financial assistance to live through old age.²⁰² The laws could ensure that, although the deceased spouse is no longer alive to help his parents should the need arise, the parents will receive some assistance from their child's estate. However, the deceased spouse's parents are entitled to this share only when the deceased spouse leaves no children.²⁰³ Accordingly, another explanation for the distribution could be a desire not to give the surviving spouse the entire estate. The motivations behind this desire could be quite benign,²⁰⁴ but the surviving spouse is still required to share the estate with a relative of the deceased spouse. If the deceased spouse did not leave any children to share the estate, then the surviving parents step in and take a share.²⁰⁵

Indeed, in four of the twenty-eight states, the surviving spouse's share in situations when the deceased spouse leaves no children remains the same as it

214 (2004) (giving surviving spouse all of deceased spouse's personal and real property if surviving spouse was married to deceased spouse for at least three years, and providing that surviving spouse takes only one-half of deceased spouse's real and personal property if surviving spouse was married to deceased spouse for less than three years); DEL. CODE ANN. tit. 12, § 502 (2001) (giving surviving spouse life estate in entirety of deceased spouse's real property and first \$50,000 plus one-half of balance of deceased spouse's personal property); KY. REV. STAT. ANN. §§ 391.010, .030 (West 1999 & Supp. 2004) (giving surviving spouse none of deceased spouse's real property and only \$15,000 of deceased spouse's personal property); OKLA. STAT. tit. 84, § 213 (2001) (giving surviving spouse all property acquired by joint efforts of husband and wife during marriage plus one-third of deceased spouse's remaining estate); R.I. GEN. LAWS §§ 33-1-1, -5, -6, -10 (1995) (giving surviving spouse \$75,000 of deceased spouse's real property, life estate in remainder of deceased spouse's real property, and first \$50,000 plus one-half of remainder of deceased spouse's personal property).

²⁰¹The five states are Arkansas, Delaware, Kentucky, Oklahoma, and Rhode Island. See *supra* note 200 (listing supporting statutory citations).

²⁰²Cf. Waggoner, *supra* note 159, at 710–12 (describing general financial condition of elderly Americans and financial needs of aging surviving spouses).

²⁰³See *supra* Part III.A (discussing sharing of estate between surviving spouse and deceased spouse's children to the exclusion of deceased spouse's parents).

²⁰⁴For example, Lawrence Waggoner explains the rationale behind the UPC intestacy scheme, which gives the surviving spouse a lump sum of \$200,000, plus three-quarters of the balance of the estate when the deceased spouse leaves no children but does leave a parent:

The rationale for not granting the entire intestate estate to the surviving spouse is that a childless decedent, who is survived by a spouse and a parent and who died intestate with an estate in excess of \$243,000, probably died relatively young and without expecting to have such a large estate.

Waggoner, *supra* note 159, at 705 n.65.

²⁰⁵See *supra* notes 199–200 and accompanying text (discussing sharing of estate between surviving spouse and deceased spouse's parent).

would have been had the deceased spouse left children of any parentage.²⁰⁶ The only difference is the identity of the parties, children versus parents, sharing the remainder of the estate. Thus, laws in these four states are neutral with respect to whether the deceased spouse had surviving children. The laws require the surviving spouse to share the estate with a child or parent of the deceased spouse, but those relatives are on equal footing vis-à-vis the surviving spouse.

The laws in the other twenty-four states often give the surviving spouse a larger share when the deceased spouse left parents but no children than when the deceased spouse left children.²⁰⁷ The surviving spouse thus can benefit from having married a spouse who remained childless throughout his life. Only five states give the surviving spouse less property in some situations when the deceased spouse left no children than when the deceased spouse left children.²⁰⁸ However, the surviving spouse receives less property only compared to what the surviving spouse would have received had the surviving spouse been the other parent of all of the deceased spouse's children. Otherwise, the surviving spouse receives more property when the deceased spouse left no children. As such, surviving spouses are rewarded for marrying spouses without children from previous relationships.

²⁰⁶See CAL. PROB. CODE § 6401(a), (c) (West 2004) (giving surviving spouse same share only when deceased spouse left only one living child or issue of one deceased child); IDAHO CODE ANN. § 15-2-102(a)(2)–(3) (2001) (giving surviving spouse same share when deceased spouse left no children as when deceased spouse left children); MD. CODE ANN., EST. & TRUSTS § 3-102 (LexisNexis 2001) (giving surviving spouse same share only when none of deceased spouse's surviving children are minors, and otherwise providing surviving spouse more in situations where deceased spouse left no children than where deceased spouse left minor children); NEV. REV. STAT. §§ 134.040 (1), .050(1) (2003) (giving surviving spouse same share only when deceased spouse left only one living child).

²⁰⁷In thirteen states, the surviving spouse receives more when the deceased spouse leaves no children than she would have received in any situation where the deceased spouse left children. See ALA. CODE § 43-8-41 (1991); ARK. CODE ANN. § 28-9-214 (2004); CONN. GEN. STAT. § 45a-437 (2003); IND. CODE § 29-1-2-1 (2003); KY. REV. STAT. ANN. §§ 391.010, .030 (West 1999); LA. CIV. CODE ANN. art. 889 (2004); MASS. GEN. LAWS ch. 190, §1 (2005); MICH. COMP. LAWS § 700.2102 (2003); OKLA. STAT. tit. 84, § 213 (1990 & Supp. 2005); R.I. GEN. LAWS §§ 33-1-1, -5, -6, -10 (1995 & Supp. 2004); VT. STAT. ANN. tit. 14, §§ 401, 551 (2002); WASH. REV. CODE § 11.04.015 (2004); see also N.C. GEN. STAT. § 29-14 (2003) (receiving more when deceased spouse left only one child). In six states, the surviving spouse's share when the deceased spouse left no children is the same as it would have been had the deceased spouse left children who were also children of the surviving spouse, but the share is larger than what the surviving spouse would have received had the deceased spouse left children who were not also children of the surviving spouse. See DEL. CODE ANN. tit. 12, § 502 (2001); ME. REV. STAT. ANN. tit. 18-A, § 2-102 (1998 & Supp. 2004); NEB. REV. STAT. § 30-2302 (2003); N.H. REV. STAT. ANN. § 561:1 (1997); N.J. STAT. ANN. § 3B:5-3 (West 1983 & Supp. 2003); 20 PA. CONS. STAT. § 2102 (2004).

²⁰⁸These five states—Alaska, Colorado, Hawaii, Montana, and North Dakota—give the surviving spouse the entire estate where the deceased spouse left children and the surviving spouse is the other parent of those children. See *supra* note 168 (listing supporting statutory citations).

3. *Splitting the Estate with Siblings*

If the deceased spouse did not leave a surviving parent, the surviving spouse receives the deceased spouse's entire estate in nineteen of the twenty-eight states. In the remaining nine states, the surviving spouse does not take the entire estate, but rather splits the estate with the deceased spouse's siblings or other relatives.²⁰⁹ In all nine of these states, the share that goes to the deceased spouse's siblings is the same as the share that would have gone to the deceased spouse's parents. The surviving spouse therefore receives the same amount of property as she would have received had the deceased spouse left parents.

Accordingly, in these nine states, the siblings could be seen as stand-ins for the deceased spouse's parents. However, the share given to the siblings cannot be explained by a desire to support the elderly, because the deceased spouse's surviving siblings are not necessarily likely to be older than the surviving spouse. Rather, instead of reflecting the partnership theory or a theory of support for children or the elderly, these laws seem to reflect a desire to ensure that the deceased spouse's childhood family,²¹⁰ in addition to his family by marriage, takes a part of his estate.

C. Overall Comparison to Divorce

Because none of the separate property states' intestacy laws employ a concept of marital property or community property when distributing a deceased spouse's estate, these laws fail to embrace the partnership theory of marriage. However, surviving spouses in community property and separate property states can receive more property under intestacy than they would have likely received upon divorce because the surviving spouse is entitled to all, or at least a majority,²¹¹ of the deceased spouse's traditional probate estate.²¹² This is particularly likely when the deceased spouse left no children.²¹³ When

²⁰⁹See ARK. CODE ANN. § 28-9-214 (2004); KY. REV. STAT. ANN. §§ 391.010, .030 (West 1999); LA. CIV. CODE ANN. art. 892 (2000); MASS. GEN. LAWS ch. 190, § 1 (2003); NEV. REV. STAT. § 134.050 (2003); OKLA. STAT. tit. 84, § 213 (1990 & Supp. 2005); R.I. GEN. LAWS §§ 33-1-1, -10 (1995 & Supp. 2004); VT. STAT. ANN. tit. 14, § 551 (2002); WASH. REV. CODE § 11.04.015 (2004).

²¹⁰For discussion of the term "childhood family," see *supra* note 140.

²¹¹When a deceased spouse leaves children, eighteen of the fifty states always give the surviving spouse more than half, if not all, of the deceased spouse's traditional probate estate. See *supra* notes 191–192 (listing eighteen states that guarantee surviving spouse more than half of deceased spouse's estate).

²¹²For discussion of the traditional probate estate, see *supra* notes 75–77 and accompanying text.

²¹³When a deceased spouse leaves no children, forty-five states always give the surviving spouse more than half, if not all, of the deceased spouse's traditional probate estate. See *supra* text accompanying notes 193–200 (listing citations and explaining amount of share in each of forty-five states). The only states that do not guarantee the surviving spouse more than half of the probate estate are Arkansas, Delaware, Kentucky, Oklahoma, and Rhode Island. See *supra*

the deceased spouse left children, the amount of the property awarded to the surviving spouse can fall to one-half²¹⁴ or less²¹⁵ of the traditional probate estate. How these property distributions compare to the property divisions that would have likely occurred upon divorce depends on how the spouses divided the title of the property accumulated from wages during the marriage, the amount of nonprobate property accumulated from wages during marriage, and the amount of separate property included in the deceased spouse's probate estate.²¹⁶

IV. REFLECTIONS ON MARRIAGE AND GENDER

In most states, the way a marriage ends—divorce or death—greatly affects how the property of a marriage will be distributed under a state's default rules. If the marriage ends by divorce, in every state the court is required to make either an equal or equitable distribution of most of the property accumulated from the wages of both spouses during marriage²¹⁷ in accordance with a partnership theory of marriage.²¹⁸ If the marriage ends by the death of a spouse, in most states the court is not permitted to distribute the assets accumulated from the wages of both spouses during marriage. Rather, in all of the separate property states, there is no concept of marital property or community property at death. Instead, when a spouse dies without a will, intestacy laws give the surviving spouse the right to a share of only those assets titled in the deceased spouse's name that are subject to the probate process. And if the deceased spouse attempted to disinherit the surviving

note 200 (listing citations and discussing when surviving spouse either can receive or always receives less than half of deceased spouse's estate).

²¹⁴Thirty-seven states always give the surviving spouse at least half of the deceased spouse's estate when the deceased spouse leaves children. These states include the eighteen states that always give the surviving spouse more than half of the estate, *see supra* note 211 (listing states that guarantee surviving spouse more than half), and nineteen states that give the surviving spouse half of the estate: Alabama, Connecticut, Florida, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina, Texas, West Virginia, and Wyoming. *See supra* text accompanying notes 179–182, 191–92 (discussing states where surviving spouse receives at least half of deceased spouse's estate when deceased spouse leaves children).

²¹⁵In the remaining thirteen states, the surviving spouse can receive less than half, or always receives less than half, of the deceased spouse's estate when the deceased spouse leaves children. These thirteen states are Arkansas, Delaware, Georgia, Kentucky, Indiana, Mississippi, North Carolina, Ohio, Oklahoma, Rhode Island, Tennessee, Vermont, and Virginia. *See supra* text accompanying notes 179, 183–184 (discussing states where surviving spouse receives less than one-half of deceased spouse's estate when deceased spouse leaves children).

²¹⁶*See supra* text accompanying notes 153–57 (discussing why use of traditional probate estate fails to reflect partnership theory of marriage).

²¹⁷For a brief discussion of the types of property accumulated during marriage that are not subject to an equal or equitable division, *see supra* note 30.

²¹⁸*See supra* text accompanying notes 40–50 (discussing rise of partnership theory in context of divorce)

spouse through the execution of a will, most elective share laws give the surviving spouse the right to less than one-half of those assets. As such, the partnership theory of marriage that has come to dominate property distribution in the context of divorce is frequently absent in the context of death.²¹⁹

The obvious question is why. If the states were committed to a partnership theory of marriage there would seem to be no reason to limit its application to the distribution of marital property upon divorce. Under the theory, a married couple is assumed to share almost all of the financial assets accumulated during marriage regardless of which spouse directly earned those assets. During marriage, the states do little to police this sharing. Accordingly, in all of the separate property states, the spouse with title to property may generally sell or give away that property without the permission of the other spouse.²²⁰ When a marriage ends by divorce, however, the spouse with title does not get to decide the fate of that property.²²¹ Rather, both spouses are considered to own the property and the property is thus subject to equitable distribution by the court.²²² When a marriage ends by death, the same, or a similar, distribution could occur to reflect the fact that each spouse owns half of the assets accumulated during the marriage.²²³ What does it mean that most states have not adopted this approach?

A. *Exploring Why Death Is Different*

The fact that the partnership theory of marriage does not inform inheritance laws in most states may simply be the result of historical differences in the development of inheritance law and divorce law. The two types of laws developed separately in accordance with different policy goals. The maintenance of family land motivated early English inheritance law, with property automatically passing to the oldest son.²²⁴ By 1540 this policy gave way²²⁵ to a policy of respecting husbands' testamentary freedom—married women could not own property—and this testamentary freedom received legal protection from the beginning of the colonial period in what became the United

²¹⁹The partnership theory is largely absent in all but the community property states. See *supra* text accompanying notes 66–69, 151 (discussing inheritance laws in community property states).

²²⁰SINGER, *supra* note 22, at 380.

²²¹*Id.* at 381.

²²²*Id.* at 380–82.

²²³Indeed, this is what most trusts and estates scholars have proposed. See *supra* note 14 (listing articles advocating extension of partnership theory of marriage to inheritance law).

²²⁴See SHAMMAS ET AL., *supra* note 75, at 21–25.

²²⁵Interestingly, however, the analyses in Part II and III, *supra*, indicate that a policy in favor of passing property to one's children continues to influence the surviving spouse's entitlement to the deceased spouse's estate, especially in those situations where the surviving spouse's share is reduced because the deceased spouse left children at his death.

States.²²⁶ Testamentary freedom was subsequently extended to married women, and it is now so entrenched that it is often referred to as a right.²²⁷ Restrictions on the freedom have primarily been justified by a desire to keep a deceased individual's dependents from becoming dependent on the state.²²⁸ To this day, as set forth above, elective share laws in most states seem to be designed more to support surviving spouses rather than to acknowledge contributions to a marital partnership.²²⁹

In contrast, the preservation of marriage motivated early divorce law, which made it extremely difficult for spouses to become legally divorced.²³⁰ Over time, fault-based divorces were increasingly granted, with the property of the marriage also divided largely on the basis of fault.²³¹ After studies performed in the 1960s showed that couples increasingly manufactured fault to obtain divorces, California became the first state to permit no-fault divorce,

²²⁶See SHAMMAS ET AL., *supra* note 75, at 25–33; Lawrence M. Friedman, *The Law of the Living, The Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 355–59; *see also* Hodel v. Irving, 481 U.S. 704, 716 (1987) (“In one form or another, the right to pass on property—to one’s family in particular—has been part of the Anglo-American legal system since feudal times.”).

²²⁷*See, e.g.,* Irving, 481 U.S. at 715 (“There is no question, however, that the right to pass on valuable property to one’s heirs is itself a valuable right.”). For a discussion of the justifications for testamentary freedom, *see* Hirsh & Wang, *supra* note 62, at 6–14.

²²⁸Other restrictions on the “dead hand” have been justified by a desire to preserve historic property or to limit discrimination. *See* DUKEMINIER & JOHANSEN, *supra* note 19, at 471–81, 793–94. During the colonial period and the early years of the United States, as in England at the time, testamentary freedom was restricted only to the extent of giving widows a right to dower, defined as a one-third life estate of a deceased husband’s real property, and widowers a right to curtesy, defined as a life estate in a deceased wife’s land so long as the marriage had produced a child. *See* SHAMMAS ET AL., *supra* note 75, at 25–33 (discussing characteristics of English inheritance law); Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1660–61 (2003) (discussing history of dower in United States); George L. Haskins, *Curtsey in the United States*, 100 U. PA. L. REV. 196, 200–12 (1951) (discussing general characteristics of curtesy in United States as it evolved from English common law). Over the course of the nineteenth and early twentieth centuries, many states abolished dower and curtesy, both in order to eliminate restraints on the alienation of land and to respond to women’s rights activists’ calls for greater equality between men and women. *See* Dubler, *supra*, at 1669–83 (discussing gradual demise of dower). In the place of dower and curtesy came the predecessors of the elective share laws discussed above. *Id.* at 1672. The earliest versions of those laws gave surviving spouses, both male and female, the right to take, at most, one-third of the deceased spouse’s estate in fee simple. *See* SHAMMAS ET AL., *supra* note 75, at 85–86, 94, 170. This amount was in keeping with most states’ intestacy laws at the time, which gave a larger intestate share to children than to surviving spouses and, in the absence of children, gave other relatives a share equal to that of the surviving spouse. *Id.* at 167. However, some states continued to give surviving spouses a right to a life estate only. *Id.* at 165. As discussed *supra* note 124, two states, Connecticut and Rhode Island, continue to this day to limit the elective share to a life estate in a portion of the deceased spouse’s estate.

²²⁹*See supra* text accompanying notes 75–77 (explaining that elective share laws were historically designed to support surviving spouse).

²³⁰For a general discussion of the results of tightly regulating the availability of divorce, *see* FRIEDMAN, *supra* note 7, at 181–84; and Fineman, *supra* note 7, at 799–801.

²³¹*See, e.g.,* COTT, *supra* note 1, at 46–55 (discussing rise of fault-based divorce).

and no-fault divorce is now available in every state.²³² Among other things, the removal of fault signaled that states no longer viewed marriage solely as an obligation, but rather also considered it to be a partnership of affection.²³³ Feminists and others also emphasized that marriage was a partnership of life assets in order to ensure that wives who had not been actively engaged in the workforce during marriage received adequate property upon no-fault divorce, since wives could no longer use fault to increase their bargaining power.²³⁴

Given the different histories and objectives of inheritance and divorce law, it is not surprising that the laws governing property distribution at divorce and death varied greatly going into the last half of the twentieth century. What is more surprising is that the differences remain to such an extent today. States have uniformly passed divorce laws motivated by the partnership theory of marriage, as set forth in Part I of this Article, but most states have failed to acknowledge that marriages that are viewed as partnerships at divorce can also end in death.²³⁵

The fact that most states have not yet adopted inheritance laws that conform to the partnership theory of marriage could be due to various factors. State legislators may have simply overlooked the applicability of the partnership theory of marriage to inheritance law, particularly since few feminists, or others, have pushed for such reforms.²³⁶ Or state legislators may be ambivalent about the partnership theory of marriage. Or they may not believe that the theory should apply to marriages that end by death. It would be impossible to test any of these hypotheses without in-depth analyses of legislative debate and opinion in each state, analyses that are beyond the scope of this Article.

Irrespective of specific legislative intent, however, the fact remains that the inheritance laws in these states send a different message about marriage than do the inheritance laws in the minority of states. Other scholars have shown in various contexts how legal regulation of marriage expresses the states' conceptions of ideal conduct within marriage.²³⁷ In the context of

²³²See *supra* text accompanying notes 42–43 (discussing rise of no-fault divorce).

²³³See *supra* text accompanying note 44 (discussing evolving view of marriage as partnership of affection).

²³⁴See *supra* text accompanying notes 45–46 (discussing forces that lead states to begin to embrace partnership theory of marriage at divorce).

²³⁵Once again, the exceptions are the nine community property states. See *supra* text accompanying notes 66–69, 151 (discussing distribution of deceased spouse's property in community property states).

²³⁶See *infra* text accompanying notes 253–57 (discussing limited feminist involvement in inheritance reform).

²³⁷See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 5–9 (1987) (explaining how law can alter norms of marriage); Scott, *supra* note 43, at 1926, 1928–30 (“[T]he state, through the law’s expressive function, subtly shapes the definition of marital roles and norms even while leaving enforcement to the existing normative structure.”); Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479, 1493–508 (2001) (discussing legal and extralegal norms during marriage and at divorce).

divorce, the laws informed by the partnership theory of marriage endorse, and even encourage, an egalitarian relationship in which opportunities for selfishness are checked.²³⁸ Comparing those divorce laws with most states' inheritance laws reveals a conflicting conception of marriage, one that rewards commitment, often at the cost of equality. As discussed in the section below, surviving spouses, usually wives,²³⁹ must sacrifice property to which they would have been entitled upon divorce. At least initially, such sacrifice seems fundamentally at odds with a conception of marriage as a partnership between two equals.

B. Unmasking Sacrifice

Default inheritance laws can be viewed as expressing an expectation of wifely sacrifice because they reduce the amount of property to which the surviving spouse is entitled at the end of marriage. In the majority of states, a deceased spouse is permitted to devise by will all property titled in his name, even if that property was obtained from wages during marriage.²⁴⁰ The deceased spouse is thus permitted to give away property that he does not own, as ownership is defined under the partnership theory.²⁴¹ The deceased spouse would not have control of this property at divorce, but he does at death. The only recourse for surviving spouses can be found in the elective share statutes, but these fall short of implementing the partnership theory in all of the separate property states.²⁴²

Because a spouse is not ensured an equitable amount of marital property if the marriage ends by death, but is ensured an equitable amount if the marriage ends by divorce,²⁴³ the separate property states could be seen as penalizing individuals who stay in marriage until the death of their spouses. This seems implausible, however, and even perverse. Less perversely, these states could be viewed as promoting traditional notions of marriage as a lifelong obligation by

For a similar discussion in the context of same-sex relationships, see E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1064–66 (1999).

²³⁸See *supra* text accompanying notes 53–60 (relating principles of partnership theory to divorce).

²³⁹See *supra* note 15 (discussing demographic statistics revealing that most surviving spouses are women).

²⁴⁰See *supra* text accompanying notes 61–62, 226–27 (discussing general principle of testamentary freedom).

²⁴¹See *supra* text accompanying notes 30–39 (discussing how ownership of property is redefined in separate property states in context of divorce).

²⁴²See *supra* text accompanying notes 78–143 (discussing why various elective share laws fail fully to implement partnership theory of marriage).

²⁴³However, spouses are ensured this amount only under the states' default rules. Spouses can enter into pre- or post-nuptial agreements that alter the default rules, and many states are increasingly upholding the terms of those agreements. *Developments in the Law, supra* note 18, at 2078–87, 2096–98.

rewarding individuals who stay married until their own deaths. After all, marriages that end by death are not voluntarily terminated. The reward is twofold: first, the deceased spouse is given testamentary power over property he would not own upon divorce, and second, the deceased spouse may give the bulk of that property to individuals other than the surviving spouse. The deceased spouse is thus given one last chance to exercise individual agency over property, including property that he would not own under the partnership theory of marriage.

Of course this reward often could have the effect of leaving the surviving spouse less than half of the property accumulated from wages during the marriage.²⁴⁴ Surviving spouses are thus deprived of property they would own pursuant to the partnership theory of marriage. In fact, they would have likely been better off financially had they divorced their spouses rather than waiting for their marriages to end by death. This seems at odds with the states' purported interest in promoting marriage as an obligation lasting "until death do us part."

The states' implicit acceptance of this tradeoff could suggest that the states believe that surviving spouses have less need for property than do divorcing spouses, possibly because surviving spouses tend to be older than divorcing spouses.²⁴⁵ Of course older surviving spouses may have more need for property if they are retired or if their health increasingly fails with age, but they will need property for a shorter period of time as compared to most divorced spouses. The states' acceptance of the tradeoff could also reflect the states' view that surviving spouses will accept less property because they have already shown a willingness to sacrifice by staying married until the death of their spouses. States may thus believe that surviving spouses should be willing to continue to sacrifice their own individual financial interests for the good of other family members or friends, or simply out of respect for the intent of the deceased spouse.²⁴⁶ After all, death, unlike divorce, ends both a marriage and an individual's life. This expectation of sacrifice can explain both elective share laws that give surviving spouses a right to less than one-half of the

²⁴⁴ As discussed *supra* text accompanying notes 87–97, 105–06, 113–15, 141–42, however, the surviving spouse is not always left with less than half of the property. The surviving spouse could receive half of the property accumulated from wages during the marriage, or even more, if (in some states) all of the property accumulated from wages during the marriage was titled in the deceased spouse's name and was all subject to the probate process, the deceased spouse had sufficient amounts of separate property in his probate estate, or the surviving spouse had assets titled in her own name.

²⁴⁵ See *supra* text accompanying notes 228–29 (discussing traditional idea that testamentary intent should be restricted only to keep deceased individuals' dependents from becoming dependent on state). In addition, Carol Rose has described how women are perceived as being less interested in property. CAROL ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 233, 238–41 (1994); Carol Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 450–54 (1992).

²⁴⁶ Indeed, the elective share is, in fact, "elective," meaning that the surviving spouse is not required to go against her spouse's testamentary wishes.

deceased spouse's estate as well as intestacy laws that require surviving spouses to split the deceased spouse's estate with children or other family members.

Since most surviving spouses are wives,²⁴⁷ these potential messages about surviving spouses affect women more than men. Indeed, the states could be seen as sending messages that women tend to need less property than men do, or that wives should be willing to sacrifice their own individual interests for the good of their husbands and families. Such messages would not be new. Feminist and family law scholars have long argued that traditional marriage law required wives to sacrifice their own interests in order to care for the family,²⁴⁸ and some scholars continue to believe that marriage law continues to indirectly assign dependency to women.²⁴⁹ Other scholars have shown how social and economic forces other than marriage law continue to create the conditions whereby women often choose "wifely sacrifice" over single motherhood or solitary living.²⁵⁰ Sacrifice is no longer thought to be directly encouraged by the states, however. Rather, most scholars believe that marriage law has "embraced principles of equality"²⁵¹ by, among other things, embracing the partnership theory of marriage in the context of divorce.²⁵² The fact that most states do not treat women as equal marital partners if their marriages end by the deaths of their husbands, instead of through divorce, seems to be an anomaly in need of reform.

The most interesting question may therefore be why feminists in most states²⁵³ have not called for the reform of inheritance laws much as they earlier

²⁴⁷See *supra* text accompanying note 15 (discussing statistics showing that most surviving spouses are women).

²⁴⁸See, e.g., Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 533 (1998) (describing how wife's dependency and sacrifice is reinforced in traditional marriage); Scott, *supra* note 43, at 1914-16 (discussing how gender norms of traditional marriage defined "good" wife and mother as one who "devoted her efforts to serving her family's needs, subordinating her own interests and preferences"); Singer, *supra* note 29, at 1112-13 ("[T]he theoretical obligation to support a dutiful wife was the price men paid for legal and economic dominance during marriage; conversely, the promise of lifetime spousal support was the carrot the legal system held out to women to persuade them to sacrifice their legal and economic independence in favor of a long-term domestic career."); see also *supra* note 54 (listing sources discussing patriarchal nature of traditional marriage).

²⁴⁹See, e.g., Martha Albertson Fineman, *Divorce and Feminist Legal Theory*, 82 GEO. L.J. 2521, 2522-23 (1994) ("Women are socially and culturally assigned dependency. Men, as husbands, fathers, or taxpayers, are let off the hook.").

²⁵⁰Bernstein, *supra* note 2, at 179-80; see also McCluskey, *supra* note 17, at 331-32 (describing care work performed by women as "self-sacrificing labor for others").

²⁵¹Scott, *supra* note 43, at 1944; see also Kelly, *supra* note 13, at 142-46, 177-208 (arguing for better implementation of those principles).

²⁵²For a critique of the view that marriage law no longer perpetuates inequality, see Hasday, *supra* note 45, at 868-70.

²⁵³The exception can be found in Wisconsin where women's groups successfully lobbied in the 1970s and 1980s to make the state a community property state by invoking arguments about both death and divorce. See SHAMMAS ET AL., *supra* note 75, at 170 (noting women's triumph over lawyers' and tax accountants' lobbies, who were opposed to change); Fineman,

called for the reform of divorce law, or as they called for increases in the elective share in the years after women achieved suffrage.²⁵⁴ The answer is unclear, but may, in part, be explained by a discomfort with death; feminists, like everyone else, would rather not think about it.²⁵⁵ Even if feminists have been thinking about death, they may have chosen to prioritize other issues. Feminist legal scholars have certainly increasingly focused on ways that women can balance work and family, a subject that is far from death.²⁵⁶ Also, the feminists who spurred the so-called second wave of the women's movement, including its focus on divorce reform, are only now personally facing the possibility, or reality, of widowhood in significant numbers.²⁵⁷ This time of personal relevance coincides, however, with a time of reduced energy for many second-wave feminists.

But these speculations presuppose that feminists would want to extend the partnership theory of marriage to the distribution of marital property upon death. Given that very few feminists have questioned the underlying premises of the partnership theory, this presupposition seems to be correct.²⁵⁸ A closer

supra note 7, at 842–80. In addition, Mary Louise Fellows has advocated some feminist reforms of inheritance law, but not of the nature discussed here. See Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers"*, 10 LAW & INEQ. 137 *passim* (1991).

²⁵⁴From 1920 until the 1950s, feminists played an instrumental role in achieving the legal reforms that replaced dower with a right to an elective share in fee simple. Dubler, *supra* note 228, at 1691–94. These early feminists did not ask the state to mandate an equal division of marital property upon death, but instead asked only for a one-third share in fee simple. *Id.* It may be easy to question this strategy in hindsight given modern notions of equality between the sexes. At the time, however, this strategy likely seemed sound because marriage was not yet widely viewed as a partnership of equals, and a one-third share in fee simple represented a vast improvement over dower's life estate.

²⁵⁵For a general discussion of cognitive dissonance in the context of death, see Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1049–51 (2004).

²⁵⁶E.g., Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 97–109 (2002); Tonya L. Brito, *Spousal Support Takes on the Mommy Track: Why the ALI Proposal is Good for Working Mothers*, 8 DUKE J. GENDER L. & POL'Y 151, 153–56 (2001); Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 214–23 (2000); Kessler, *supra* note 17, at 460–68; Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 841–47 (2002); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1928–63 (2000).

²⁵⁷The second wave of the feminist movement is commonly understood to have begun in the 1960s. See Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 Wm. & Mary L. Rev. 209, 210 (1998) (discussing the origin of the second wave of the feminist movement in the 1960s). The first wave of the feminist movement is commonly understood to consist of the years leading up to the passage of the Nineteenth Amendment in 1920. See NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 3–10 (1987).

²⁵⁸Professors Martha Fineman and Marjorie Kornhauser have provided the most sustained feminist criticism of the partnership theory. See FINEMAN, *supra* note 41, *passim*; Kornhauser, *supra* note 13, *passim*. However, these criticisms revolve around the argument that many wives deserve more than one-half of the assets accumulated from wages during marriage, not less. Therefore, even Professors Fineman and Kornhauser would likely call for the reform of inheritance law.

examination of the partnership theory, however, reveals that it is not free from the expectation of sacrifice that is present in current inheritance laws. While the partnership theory obscures wifely sacrifice, it does not eliminate such sacrifice and may, in fact, reinforce it. Asking whether inheritance laws should be reformed to conform to the partnership theory could thus provide feminists and others with an opportunity to reexamine the desirability of the partnership theory of marriage in general. The next section begins this reexamination.

C. Rethinking Partnership

Extending the partnership theory of marriage to inheritance law would likely further two goals long held by feminists. First, such an extension would likely increase the material well-being of many widows. Second, the extension of the partnership theory would acknowledge in all contexts—not just divorce—that the wages earned by one spouse are not solely the result of individual effort, but usually are also the product of intangible care work provided by the other spouse, usually the wife. Such acknowledgment of this unpaid labor has long been a feminist goal.²⁵⁹

However, extending the partnership theory of marriage to inheritance laws would not necessarily be consistent with two other goals long held by feminists. As set forth below, many feminists also seek to ensure that legal reforms benefit a wide range of women, and that such reforms provide women with meaningful choices about how to live their lives. The partnership theory of marriage falls short of meeting each of these goals.

1. Who Benefits?

Increasingly, feminists have asked which women benefit from feminist reforms and theories in various contexts.²⁶⁰ Do the majority of women benefit, or are the benefits disproportionately heaped on white women, or wealthy women, or straight women? These questions have been probed in the context of alimony,²⁶¹ among others,²⁶² but not in the context of marital property

²⁵⁹E.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* 188–95 (2004); Katharine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 3–8 (1996); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1573–75 (1996). For a criticism of this goal from a feminist perspective, see Schultz, *supra* note 256, at 1905–08.

²⁶⁰Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 193–200 (1989); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245–71 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585–605 (1990); Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 *passim* (1988).

²⁶¹Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2483, 2486–95 (1994). Professor Perry argues that her analysis is limited to alimony, rather than property division at the end of a marriage, because

division at either divorce or death. It is therefore worth examining which women benefit materially from the partnership theory of marriage, whether at divorce or death.

As set forth earlier, the underlying premise of the partnership theory is that intangible contributions to a marriage, such as child care, housework and other care work, should be valued on par with tangible financial contributions, thus leading to an equal or equitable division of tangible assets.²⁶³ This premise most advances the material well-being of those wives who forego market work in order to do care work. Indeed, these women would own no property but for the partnership theory of marriage. But, as feminists have acknowledged in other contexts, historically only certain women—namely white middle- to upper-middle-class women—could afford to forego market work,²⁶⁴ and, increasingly, many of those women have found that they must work to make ends meet.²⁶⁵ Thus, today, the partnership theory of marriage most benefits only those women who can afford to stay at home and choose to do so.

In addition, the amount of material benefit received by these women is directly tied to the amount of money earned by their husbands. Under the partnership theory, the value of care work is not independently set. Rather, wives who forego market work receive half of every dollar earned by their husbands. Therefore, the more money earned by the husband, the more the wife benefits from the partnership theory of marriage. The partnership theory of marriage thus most benefits not only those women who can afford to stay at home, but the subset of those women who are married to wealthy men.²⁶⁶

[a] property settlement, however favorable it may be, is final and does not give rise to a continued relationship or dependency on a more economically powerful spouse.

In contrast, alimony has the potential to continue and to reinforce at least some level of economic dependency by women on the financial status of their former spouses.

Id. at 2484 n.16. This Article attempts to show that the distinction between alimony and property division is not as dispositive as Professor Perry claims because the partnership theory of marriage can reinforce wifely sacrifice and dependence on a wage earning husband. *See infra* text accompanying notes 272–79 (explaining how partnership theory may both obscure and reinforce expectation of wifely sacrifice).

²⁶²See McCluskey, *supra* note 17, at 326–29 (asking these questions with respect to federal tax “marriage bonus” and social security benefits).

²⁶³For a more detailed discussion of this premise, see *supra* text accompanying notes 53–60.

²⁶⁴See Perry, *supra* note 261, at 248–89; Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J. L. & FEMINISM 51, 52–62 (1997).

²⁶⁵See ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE CLASS PARENTS ARE GOING BROKE* 10 (2003).

²⁶⁶See Perry, *supra* note 261, at 2497–503 (discussing this phenomenon in context of alimony and describing ways “value is assigned on the basis of the status of the adult males in [women’s] lives”); see also Karen C. Burke & Grayson M.P. McCouch, *Women, Fairness, and Social Security*, 82 IOWA L. REV. 1209, 1230–32 (1997) (looking at similar phenomenon in context of federal tax and social security benefits, and discussing how social security benefits could be viewed as implying that society values housework performed by high-wage earner’s spouse more highly than that performed by low-wage earner’s spouse); McCluskey, *supra* note

Of course wives who do not forego market work can also benefit from the partnership theory of marriage, but their care work is valued less than the care work of the wives who forego market work. Every dollar earned by a wife in the market translates into a dollar by which her care work is undervalued, at least when compared to the wife who foregoes market work.²⁶⁷ Thus, women who both work outside of the home and do the bulk of the care work within the home may not benefit from the partnership theory of marriage and may even be harmed by it. For example, the intangible contributions of a wife who earns as much as her husband yet also does most of the housework and child-care coordination—a situation that is increasingly common²⁶⁸—will be completely unvalued pursuant to the partnership theory of marriage. Similarly, in the rare situations where a husband earns as much as his wife and also does the bulk of the care work, the husband's care work will be completely unvalued. And a wife who earns more than her husband yet also does most of the housework and child-care coordination will be hurt by the partnership theory because she must share her wages with her husband even though he did not make significant intangible contributions to the marriage.

Therefore, it is beyond dispute that the women who benefit most from the partnership theory of marriage are those who forego market work and are married to wealthy men. In addition to being privileged by wealth, these women also tend to be white, primarily because most women of color do not forego market work and those who do tend not to be married to wealthy men.²⁶⁹ Moreover, although lesbians are not permitted to marry their same-sex partners in most states, if same-sex marriages were more widely recognized, it is doubtful that married lesbians would benefit from the partnership theory in the same way that straight women married to wealthy men do because women

17, at 326 (discussing how such policies privilege “high-income earners married to an unpaid family care worker”).

²⁶⁷For discussions of this phenomenon in the context of alimony, see Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 40–48 (1989). Of course women who engage in wage work may perform less care work than women who forego wage work, possibly justifying devaluation of their care work. However, as the partnership theory of marriage is currently configured, the devaluation has no bearing on the actual number of hours spent performing care work. For a sustained and convincing argument that care work should be valued independently from ties to a wage worker, see Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1 *passim* (2005).

²⁶⁸See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 164–66 (1995); ARLIE RUSSELL HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT* 149–66 (2d ed. 2003); Cahn, *supra* note 237, at 182–86; Andrea Veltman, *The Sisyphean Torture of Housework: Simone de Beauvoir and Inequitable Divisions of Domestic Work in Marriage*, 19 HYPATIA 121, 130–32 (2004); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 519–24 (1998).

²⁶⁹Perry, *supra* note 261, at 2486–97; Roberts, *supra* note 264, at 59–62. Indeed, some African-American women choose to exit the workforce even if they are not married to wealthy men in order to resist historical oppression that denied them access to the cult of domesticity. See Kessler, *supra* note 267, at 13–25; Perry, *supra* note 261, at 2492 & n.48.

tend to earn less than men, particularly at the highest levels of the professions,²⁷⁰ and lesbians tend not to adopt the traditional division of care work and market work that maximizes the material benefits of the partnership theory.²⁷¹ The partnership theory of marriage thus seems to be a vestige from the time when feminist reforms primarily benefited privileged women.

2. *Are Choices Free or Constrained?*

Despite the problems identified above, it is possible that more women than not receive some material benefit from the partnership theory of marriage, particularly given discrimination in the workplace that prevents many wives from earning as much as their husbands.²⁷² But even if most women receive some material benefit from the partnership theory, this may come at the cost of women's ability to make choices free of gender-role expectations.

By providing the greatest material benefits to women who forego market work, the partnership theory of marriage reinforces the traditional division of labor allocating wage work to men and care work to women.²⁷³ As set forth above, the partnership theory values care work the most when the spouse performing that work does not also engage in market work. Of course this spouse could be the husband, but in most situations it will be the wife, given women's historical exclusion from the workplace, lingering discrimination and pay disparities in the workplace, and the different socialization to which men and women are subjected.²⁷⁴

Some scholars praise this role division as economically efficient.²⁷⁵ Most feminists, however, have long criticized the separate spheres ideology underlying such gender-role divisions.²⁷⁶ The partnership theory itself does nothing to challenge the assignment of wives to care work and husbands to

²⁷⁰See M.V. LEE BADGETT, *MONEY, MYTHS AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN* 49 tbl.2 (2001) (showing that, on average, women, whether straight or lesbian, earn at least \$7000 less per year than straight men).

²⁷¹See Cain, *supra* note 260, at 202–03.

²⁷²See BADGETT, *supra* note 270, at 49 tbl. 2.

²⁷³For a similar insight about tax and social security benefits for married couples, see McCluskey, *supra* note 17, at 328.

²⁷⁴See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1186–202 (1989); Becker, *supra* note 256, at 92–94; Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415–16 (1991).

²⁷⁵See, e.g., BECKER, *supra* note 56, at 14–37 (discussing role specialization in marriage); Carbone & Brinig, *supra* note 56, at 988 (describing arguments in favor of gender-role specialization); Ellman, *supra* note 267, at 46–51 (analyzing impact of role specialization and alimony on marriage relationship).

²⁷⁶For general discussions of those criticisms, see OKIN, *supra* note 54, at 157–59; June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463, 1491–94 (1990); Olsen, *supra* note 54, at 1523; Amy L. Wax, *Caring Enough: Sex Roles, Work and Taxing Women*, 44 VILL. L. REV. 495, 507–16 (1999).

wage work. Rather, the theory supports women who conform to a model of marriage that many feminists and others²⁷⁷ see as outdated and undesirable.

In addition, even if women are balancing market work and care work, the partnership theory rewards them for their care work only to the extent that the care work prevents them from earning as much as, or more, than their husbands earn. It thus provides a cushion for women who care for others at the expense of their own tangible property acquisition or other forms of individual fulfillment.²⁷⁸ The partnership theory of marriage is thus not free from the expectation of women's sacrifice within marriage, but rather could be seen as reinforcing it. Indeed, the partnership theory of marriage does nothing to challenge the "genderization" of care work and may even provide incentives to perpetuate it in those situations where women are married to wealthy men.

Therefore, the partnership theory of marriage is at odds with the goal, embraced by many feminists, of removing constraints on agency imposed by gender-role expectations.²⁷⁹ The partnership theory is also at odds with attempts by some men to escape from the expectation that they fill the breadwinner role, to the exclusion of care work.²⁸⁰ The partnership theory reinforces traditional gender roles rather than freeing women and men from them. As a result, feminists and others may not want to extend the partnership theory of marriage to property distribution upon death and may even want to reconsider whether it should govern property distribution upon divorce.

It is unlikely, however, that all feminists would agree with the above analysis. First, some feminists may have strategic objections, arguing that some individual women should not be subject to material harm in order to achieve symbolic gains. Such arguments are frequently made in the context of debates about whether the states or employers should provide child-care

²⁷⁷Indeed, many husbands do not support this model. See Judith Warner, *Guess Who's Left Holding the Briefcase? (It's Not Mom)*, N.Y. TIMES, June 20, 2004, at W2 (stating that many younger husbands "never intended, or desired, to play a typical provider role in their families. Many, like their wives, thought that our brave new world of no-gender-roles marriage would bring them a new level of personal fulfillment, emotional expression and freedom").

²⁷⁸See Perry, *supra* note 261, at 2519 ("Feminists must . . . recognize that to the extent women are protected when they play the role of full-time homemaker they will continue to see it as a viable option."). Of course many women may find care work itself to be fulfilling. See Kessler, *supra* note 17, at 454–56. However, it is beyond dispute that time spent doing care work is time that could have been spent on other pursuits.

²⁷⁹For examples of feminists embracing the goal of removing constraints on agency imposed by gender-role expectations in other contexts, see Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2479–82 (1994); Frug, *supra* note 117, at 1059–62; Tracy E. Higgins, *Why Feminists Can't (or Shouldn't) Be Liberals*, 72 FORDHAM L. REV. 1629, 1640–41 (2004). For criticism of this focus within feminist legal theory, see Emily L. Sherwin, *The Limits of Feminism*, 9 J. CONTEMP. LEGAL ISSUES 249, 252–56 (1998).

²⁸⁰See Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1065–67 & n.116 (1994); Warner, *supra* note 277; cf. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 876 (1990) ("The mystifying ideologies of gender construction control men, too, however much they may also benefit from them.").

supports for mothers who engage in wage work.²⁸¹ For example, some feminists are ambivalent about such supports because they do nothing to reallocate child-care responsibilities between mothers and fathers,²⁸² but other feminists argue that men are unlikely to perform more care work even if states or employers do not make it easier for women to balance work and family, and therefore advocate for whatever directly helps women.²⁸³

Whatever the merits of this focus on direct assistance to women in the context of the work/family debate, those merits seem to be largely absent in the context of the partnership theory of marriage. As discussed above, the partnership theory most directly helps women who are already privileged. Therefore, backing away from the partnership theory of marriage would not harm many women because most do not greatly benefit from it. Moreover, even those women who do materially benefit from the partnership theory are also constrained by it. Their benefits increase based on the length of their marriages and their continued abstention from wage work.²⁸⁴ These women may therefore be constrained to stay in their marriages and forego wage work even when they may desire otherwise.

In addition, the assumption that women benefit from the partnership theory of marriage seems to rest in large part on the assumption that most wives will also be mothers raising children. Otherwise, wives would likely not perform amounts of care work that are equivalent to the amounts of wage work performed by most husbands. This child-care assumption ignores the fact that the partnership theory of marriage applies to all marriages, including childless marriages or second or other subsequent marriages in which child care is not required because the children are grown. The assumption thus contributes to repronormativity by defining all women as mothers.²⁸⁵

²⁸¹For an excellent summary and analysis of such debates, see Tracy E. Higgins, *Job Segregation, Gender Blindness, and Employee Agency*, 55 ME. L. REV. 241, 251–59 (2003). See also Katherine B. Silbaugh, *The Structures of Care Work*, 76 CHI.-KENT L. REV. 1389 *passim* (2001) (summarizing ways to support and reallocate care work).

²⁸²Mary Anne Case, Commentary, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should be Shifted*, 76 CHI.-KENT L. REV. 1753, 1753–62 (2001); Katherine M. Franke, Commentary, *Taking Care*, 76 CHI.-KENT L. REV. 1541, 1544 (2001).

²⁸³For a general discussion in favor of policies that support women's child-care responsibilities, see Becker, *supra* note 256, at 93.

²⁸⁴As Professor Perry asks:

What would it mean for privileged women to envision a world that does not embody a Cinderella story, in which they marry a powerful man who provides them with lots of 'choices.' What if they said to themselves: 'I alone am responsible for my economic status and my economic well-being whether or not I choose to be with a man?' The prospect may be frightening as well as liberating.

Perry, *supra* note 261, at 2514; see also McCluskey, *supra* note 17, at 329 (discussing similar phenomenon in context of tax and social security benefits for married couples).

²⁸⁵See Perry, *supra* note 261, at 2505 n.93 ("[T]heories which depend too heavily on the presence or absence of children reinforce societal hierarchies that devalue women who have been unable to, or who have chosen not to, bear children. Part of recognizing diversity among

Second, some feminists may object that a focus on freeing women (and men) from traditional gender-role expectations simply perpetuates the liberal feminist fiction that women are the same as men.²⁸⁶ Such arguments are often made when discussing child care given the reproductive differences between men and women. However, as discussed by other scholars, biology determines childbearing, not childrearing.²⁸⁷ Thus, the primary gender difference to be taken into account would be a psychological one: many cultural feminists argue that women are more relational than men, and hence value autonomy less than men do.²⁸⁸ As such, according to those feminists, increasing women's individual agency would not take into account women's actual desires and needs.²⁸⁹

However, women may very well value connection and care work over wage work because they have been constructed, or even pressured, to do so.²⁹⁰ Laws that reinforce the gendered division of care work and wage work play a role in this construction. Moving away from the partnership theory of marriage would not completely eliminate the construction of women as caregivers, which is the product of many social forces in addition to law, but it would be a step toward uncovering what individual women might desire in the absence of traditional gender-role expectations. Some women might choose to prioritize care work over wage work, whereas other women might negotiate to share responsibility for care work with their spouses, or to shift care work entirely to

women is recognizing the diverse patterns of marriages in which women put their husband's interests before their own. One pattern is that of the marriage without children." For a discussion of how legal feminists contribute to repronormativity in other contexts, see Franke, *supra* note 117, at 183–86. For a discussion of the dangers of defining all women as mothers, see Carol Sanger, *M is for the Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15, 19 (1992).

²⁸⁶See FINEMAN, *supra* note 41, at 36–38 (discussing how conception of spouses as equal partners may be illogical when wives tend to be less self-sufficient than husbands). For a discussion of similar arguments in the context of alimony, see Carbone & Brinig, *supra* note 56, at 1005–10. In addition, Martha Fineman has argued that a focus on women's agency within the family obscures the ways society relies on families to perform dependency work. See Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 252–53 (2001).

²⁸⁷For discussions disaggregating childbearing from childrearing, see Hamilton, *supra* note 2, at 361; and Kay, *supra* note 42, at 17, 84–85.

²⁸⁸See Robin West, *Jurisprudence & Gender*, 55 U. CHI. L. REV. 1, 18 (1988); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 139–45 (1987).

²⁸⁹See West, *Jurisprudence & Gender*, *supra* note 288, at 18 (discussing how women's nurturant perspectives are not recognized or protected by laws that value autonomy).

²⁹⁰See, e.g., JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 6 (2000) (describing how women "choose" to reduce their professional roles because they find themselves unable to balance work and family obligations); Frug, *supra* note 117, at 1050, 1059–60 (discussing social pressures on women to become married and rear children); Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 37, 37–45 (1987) (explaining women's relegation to inferior roles as a matter of power, not nature); M. Rivka Polatnick, *Why Men Don't Rear Children: A Power Analysis*, in MOTHERING: ESSAYS IN FEMINIST THEORY 21, 21–37 (Joyce Trebilcock ed., 1983) (exposing motherhood as a construct designed to maintain male power).

their spouses in order to devote more time to wage work or other self-satisfying pursuits. At the moment, however, although many women believe they have the ability to make free choices about work and family—a recent *New York Times* headline read: “Why Don’t More Women Get to the Top? They Choose Not To”²⁹¹—many women’s choices are likely constrained by social expectations and laws like those motivated by the partnership theory of marriage that put a thumb, or worse, on the care work side of the scale.²⁹²

As such, although the partnership theory of marriage may have been a useful interim tool for ensuring that women were not left destitute after the introduction of no-fault divorce, it is not a long-term strategy for eliminating gender-role oppression. Moreover, it may even play a role in reinforcing traditional gender expectations, including the expectation of wifely sacrifice. Although no part of the theory prevents men from engaging in care work, the theory does reinforce the traditional division between care work and wage work instead of blending the two types of work. Given existing social expectations, which are the product of history, ongoing socialization, and other social forces including law, more women than men will likely continue to engage in care work at the expense of wage work.²⁹³ Indeed, child care is still a very socially acceptable exit from full-time wage work, but for women only.²⁹⁴ Although laws informed by the partnership theory of marriage do not directly pressure women to take that exit, they do provide deferred benefits to the women who do so.

Examined in this manner, the partnership theory of marriage is not free of the expectation of wifely sacrifice. Therefore, calls to reform inheritance laws in accordance with the partnership theory of marriage fail to adequately address one of the central messages of current inheritance laws: that surviving spouses, usually wives, should be expected to sacrifice for the good of the relationship.

²⁹¹Lisa Belkin, *The Opt-Out Revolution*, N. Y. TIMES, Oct. 26, 2003, at M1. For commentary questioning the nature of such choices, see Katha Pollit, *Sex and the Stepford Wife*, NATION, July 5, 2004, at 13, 13 (“Women have become incredibly clever at explaining these choices in ways that barely mention social pressures or male desires.”).

²⁹²For a discussion of how other legal rules similarly constrain women’s choices about care work, see Frug, *supra* note 117, at 1045–66.

²⁹³For discussions regarding the various forces that influence women’s “choices” to take on primary responsibility for child care, see Czapanskiy, *supra* note 274, at 1481; Singer, *supra* note 29, at 1115; and Joan C. Williams, *Gender and Property*, in A PROPERTY ANTHOLOGY 256, 259 (Richard H. Chused ed., 2d ed. 1997).

²⁹⁴For a discussion of ways men are discouraged from exiting wage work to focus on child care, see Malin, *supra* note 280, at 1049.

V. CONCLUSION

State default rules governing the division of property at divorce and death are often touted as one of the primary benefits of marriage. However, in most states, the benefits guaranteed at death are quite different than most people assume. Indeed, in many states, a surviving spouse would likely have been better off had she divorced her spouse rather than staying in the marriage until "death do us part." This Article has discussed what this phenomenon may reveal about the states' conceptions of the ideal marriage. In particular, these states' inheritance laws reflect a conception of marriage that is not consistent with an understanding of marriage as a partnership of two equals. Instead, the laws seem to reflect a conception of marriage whereby the surviving spouse, usually the wife, is expected to sacrifice property for the good of other family members.

Reforming inheritance laws in accordance with the partnership theory of marriage would reduce the instances in which surviving spouses would be expected to sacrifice property for the good of the family, but such reforms would not necessarily eliminate all expectations of wifely sacrifice. Although the partnership theory of marriage, unlike inheritance laws, embraces a rhetoric of equality, such rhetoric does not necessarily eliminate the expectations of sacrifice that have long been found in marriage law. Instead, this Article's preliminary reexamination of the partnership theory of marriage indicates that expectations of wifely sacrifice are lurking beneath the partnership theory's rhetoric. The partnership theory most compensates wives who forego wage work in order to focus on care work. Women are therefore rewarded for caring for others, in accordance with traditional gender-role expectations.

This Article poses a challenge to the long-held view that the partnership theory of marriage is the best approach for expressing gender equality in marriage. I hope this challenge will encourage other scholars to reexamine the partnership theory of marriage that underlies current divorce law and to consider alternative theories of marriage that could underlay new default rules governing property distribution at divorce and death without reinforcing gender role oppression. A more egalitarian theory of marriage could maximize both spouses' individual agency within marriage so that the work required by the marriage—whether it be care work or wage work—would be more the product of individual desire and negotiation than gender-role expectations. Marriage law has been greatly transformed over the past two hundred years in response to women's gradual attainment of formal equality. Now is the time to explore ways marriage could also break free from gender-role oppression.